

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Douglas A. Kelley, in his	)	File No. 19-cv-1756
capacity as the Trustee of the	)	(WMW)
BMO Litigation Trust,	)	
	)	
Plaintiff,	)	St. Paul, Minnesota
	)	October 25, 2022
vs.	)	10:56 a.m.
	)	
BMO Harris Bank N.A., as	)	
successor to M&I Marshall and	)	
Ilsley Bank,	)	
	)	
Defendant.	)	

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BEFORE THE HONORABLE WILHELMINA M. WRIGHT  
UNITED STATES DISTRICT COURT JUDGE

\* \* \* REDACTED TRANSCRIPT \* \* \*

(JURY TRIAL PROCEEDINGS - VOLUME X)

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**P R O C E E D I N G S**

**IN OPEN COURT**

**(JURY PRESENT)**

THE COURT: Please be seated. Good morning.

MR. SPEHR: May I proceed, Your Honor?

THE COURT: Yes, you may. Good morning. We are ready to proceed.

**(Theodore Martens)**

**CROSS-EXAMINATION** (Continued)

BY MR. SPEHR:

Q. Good morning, Mr. Martens.

A. Good morning.

Q. When we left off yesterday, we were talking about the SPEs, right?

A. Correct.

Q. And we were talking about how the investors controlled the bank accounts of the SPEs, correct?

A. That's correct.

Q. And that meant that any funds wired out of the SPE investor-controlled accounts were directed by the investors themselves, correct?

MR. ANTHONY: Objection, Your Honor, investor information, knowledge. We covered this yesterday, I thought. May we do a sidebar? I had an objection at the close of yesterday because I anticipated this is the

1 direction they were going. May we have a sidebar to clarify  
2 this?

3 THE COURT: We may have a sidebar.

4 **(At sidebar)**

5 MR. ANTHONY: Your Honor, yesterday you may recall  
6 counsel for the defendant at some length saying that all  
7 Mr. Martens could testify to was damages, his calculation.  
8 He couldn't get into the Ponzi scheme. He couldn't get into  
9 any of the liability issues. And our examination was  
10 limited in that fashion due to their objection.

11 Now he has gone far beyond asking how he  
12 calculated his damages. He is getting into investor  
13 activity, investor knowledge. Yesterday alone he said:

14 "Based upon your investigation of the SPEs, you  
15 concluded they had no operations, correct?"

16 "They did not have any operations."

17 "They were not well capitalized; is that correct?"

18 "I think you mentioned this. They were owned and  
19 controlled by Petters, correct?"

20 "And, in fact, these SPEs for the investors had no  
21 offices, correct?"

22 That's when I objected. You struck those two  
23 questions and answers. Now we are going down that path  
24 again. If I'm barred from asking him about the liability  
25 issues, then he is.

Martens - Cross

1 MR. SPEHR: I'm simply asking questions about the  
2 flowchart that they introduced as a demonstrative through  
3 Mr. Martens; a flowchart showing the structure of the SPEs.  
4 So I am just trying to pin down what he understands about  
5 the flow of funds. That's it.

6 MR. ANTHONY: He didn't ask that. You didn't ask  
7 any of those questions.

8 MR. SPEHR: This has nothing to do with investor  
9 complicity at all. It's just pure flow of funds analysis.

10 THE COURT: We are not talking about investors, we  
11 are talking about flow of funds?

12 MR. SPEHR: That's right.

13 THE COURT: So "investors" is not going to be a  
14 word that's used?

15 MR. SPEHR: The investors were directing the  
16 money. That's the key. That's why I'm asking these  
17 questions.

18 MR. ANTHONY: And that gets --

19 MR. SPEHR: That's why I got into the question of  
20 who controls the SPE accounts, because the investors were  
21 controlling the money. The investors knew what money was  
22 going out and what money was coming in. That's what I am  
23 trying to establish.

24 MR. ANTHONY: He is getting into investor  
25 knowledge and investor complicity.

Martens - Cross

1 THE COURT: Right. How does this witness know  
2 about what the investor knows?

3 MR. SPEHR: Because -- oh, he states it in his  
4 report; that they knew that the money was going in and out  
5 of their accounts and they had a line of sight into how the  
6 money was moving. That's all I'm trying to show,  
7 Your Honor.

8 MR. ANTHONY: Well, it's investor complicity,  
9 investor knowledge, and I was barred from getting into this  
10 altogether when I tried to show that exhibit. They objected  
11 and you sustained it, and so I respected it and now they're  
12 going beyond that.

13 THE COURT: I don't understand why you should be  
14 able to get into investor knowledge when I have ruled.

15 MR. SPEHR: They put the chart in -- the flowchart  
16 that Mr. Martens created that shows the investors at the top  
17 of the stack to the SPEs and down below and then the money  
18 coming back to the investors. I have to be able to ask him  
19 about that chart.

20 They've also put another chart --

21 THE COURT: So you are asking about the chart.  
22 How does that go to investor knowledge?

23 MR. SPEHR: It simply -- when we are talking about  
24 knowledge, it's did the investors know what was coming into  
25 and out of their accounts. That's it. That's all I'm

Martens - Cross  
1 trying to show.

2 MR. ANTHONY: He hasn't put the chart up. He  
3 hasn't asked him if the money went from the investors, the  
4 SPE to Petters. He hasn't asked any of those questions. He  
5 is asking about what the investors, if they had offices,  
6 he's asking about if they had -- if they were well  
7 capitalized, if they had -- he asked him about his  
8 investigation of the SPEs. I couldn't ask any of that, and  
9 I didn't. Now --

10 MR. SPEHR: You won that battle yesterday. I am  
11 trying to -- I am being very, very straight and honest. I  
12 am trying to simply establish that the investors knew what  
13 was going into their controlled accounts and they knew what  
14 was going out of their controlled accounts and they knew  
15 that the money was going to Nationwide and Enchanted because  
16 they were directing the transactions. That has -- that's  
17 all I'm trying to do.

18 THE COURT: Why is that objectionable?

19 MR. ANTHONY: If that's all he says, did the money  
20 go to Nationwide and Enchanted, I'm fine with that.

21 THE COURT: No, no. Did the investors know  
22 that --

23 MR. SPEHR: That's right.

24 THE COURT: -- right?

25 MR. ANTHONY: Yeah. And I think we can --



1 THE COURT: So let's not take up a whole lot of  
2 time.

3 MR. SPEHR: I am not going to.

4 THE COURT: And also let's not deviate from what  
5 you have just represented.

6 MR. SPEHR: I will not.

7 THE COURT: Okay.

8 **(In open court)**

9 BY MR. SPEHR:

10 Q. So I think the question that was pending during the  
11 objection was that the investors directed the transactions  
12 in their SPE accounts, correct?

13 A. Once -- the investors controlled the account for  
14 purposes of putting -- taking money out of the account,  
15 putting money in. That's the special purpose entity bank  
16 account.

17 Q. So, for example, when PCI and an investor or hedge fund  
18 agreed to execute a transaction supposedly for the purchase  
19 of electronics, the investor would direct funds to execute  
20 that purchase, correct?

21 A. Well, there would be two things that would happen. The  
22 investor would take and first of all be given a promissory  
23 note, sign a promissory note and be given purchase orders  
24 for the procurement of the goods and then for the subsequent  
25 sale. The goods were effectively presold, allegedly

Martens - Cross

1 presold.

2 The investor would then put the money into the  
3 account and then direct then the transfer of that account --  
4 the transfer of those funds out to the vendors, Nationwide  
5 and Enchanted.

6 Q. And just to be clear, the investor directed the wiring  
7 out to Nationwide and Enchanted, correct?

8 A. That's correct.

9 Q. And the idea was that once the funds were wired by the  
10 investor to Nationwide or Enchanted, they would purchase  
11 electronics from a wholesaler such as Sony and resell those  
12 electronics to a retailer such as Costco, correct?

13 MR. ANTHONY: Objection, lacks foundation as to  
14 who "they" is.

15 THE COURT: Overruled.

16 THE WITNESS: I'm sorry. Could you repeat the  
17 question?

18 BY MR. SPEHR:

19 Q. Sure. The idea was that once the funds were wired by  
20 the investor to Nationwide or Enchanted, Nationwide or  
21 Enchanted would purchase electronics from a wholesaler such  
22 as Sony and resell those electronics to a retailer such as  
23 Costco. Is that a fair summary of the transaction as it was  
24 supposed to occur?

25 A. I think that's a fair summary from the perspective of

~~Martens - Cross~~

1 the vendor purportedly going ahead and acquiring the goods.  
2 I don't know if it was necessarily Sony. It probably wasn't  
3 Sony in all instances. And then ultimately then those goods  
4 being delivered to a big-box retailer, a Costco, for  
5 instance.

6 Q. Thank you.

7 And then to finish off the transaction, the  
8 electronics purchase transaction, is it correct to say that  
9 the retailer was then expected to pay for the electronics by  
10 sending funds directly to the controlled SPE accounts; is  
11 that correct?

12 A. I think -- I don't think that's correct. I think what  
13 was happening was the -- first of all, there were no  
14 retailer payments, but, rather, what was -- what Mr. Petters  
15 had explained to the investors was the money would come into  
16 the PCI -- PCI M&I account from a retailer, and then he had  
17 an agreement in place that within 24 hours, he would then go  
18 ahead and then put those funds into the special purpose  
19 entity bank account. PCI could only put money into the  
20 special purpose entity accounts for the various investors.  
21 PCI could not take money out.

22 Q. Right. My question focused on the way the transaction  
23 was designed through contractual arrangements and otherwise  
24 was that once the retailers made payment for the  
25 electronics, that payment was designed to go and intended to

Martens - Cross

1 go into the SPE-controlled account, correct?

2 A. I'm not sure it was designed that way. That's what I'm  
3 saying. I'm talking from my experience in tracking and  
4 tracing the transactions. I don't recall it necessarily  
5 being designed that way.

6 Q. Is it fair to say that the way the transactions were  
7 constructed, the investors expected that retail payments  
8 would be made into their controlled SPE accounts?

9 MR. ANTHONY: Objection, invades the question of  
10 investor knowledge.

11 THE COURT: Sustained.

12 BY MR. SPEHR:

13 Q. Now, what, in fact, happened here was that once  
14 Nationwide or Enchanted got money from the investors,  
15 Nationwide or Enchanted simply deducted a commission for  
16 themselves and sent the remainder of the funds to PCI's  
17 account at M&I, correct?

18 A. That's correct.

19 Q. And then PCI would, in turn, direct payment to the SPEs  
20 from the M&I account to repay the investors for the loans  
21 associated with the electronics purchases, correct?

22 A. Those funds would be used to pay investors as notes  
23 matured. So on the maturity date, whatever funds had been  
24 sent from Nationwide and Enchanted and other vendors back to  
25 PCI, those funds would be then used to then pay notes as

Martens - Cross

1 they matured, not necessarily from the same investor. Could  
2 be, but other investors as well.

3 Q. My only -- that's actually helpful, but my only question  
4 was: The end of the transaction was PCI paying out of the  
5 M&I account to the controlled SPE accounts, correct?

6 A. That's correct.

7 Q. And just to be clear, the investors had a line of sight  
8 into who was sending money into their controlled accounts --

9 MR. ANTHONY: Objection.

10 (Simultaneous indiscernible crosstalk)

11 BY MR. SPEHR:

12 Q. -- PCI, correct?

13 MR. ANTHONY: Objection, Your Honor. Seeking to  
14 invade investor knowledge and in violation of the  
15 conversation we just had.

16 THE COURT: Sustained.

17 BY MR. SPEHR:

18 Q. And just one other question. The investors also knew  
19 and understood that they were sending money to Nationwide  
20 and Enchanted, correct?

21 MR. ANTHONY: Objection, Your Honor, same  
22 objection.

23 THE COURT: Sustained.

24 BY MR. SPEHR:

25 Q. To your knowledge, Mr. Martens, did any investor ever

Martens - Cross

1 advise anyone at M&I that they never received one dime in  
2 retail payments into their restricted accounts?

3 MR. ANTHONY: Objection, Your Honor, investor  
4 knowledge.

5 THE COURT: Sustained.

6 MR. ANTHONY: Your Honor, may I ask for some  
7 instruction to counsel that he refrain from asking about  
8 investor knowledge?

9 THE COURT: Counsel, you have been instructed not  
10 to address investor knowledge and --

11 MR. SPEHR: I -- I'm sorry.

12 THE COURT: -- you're a very capable attorney and  
13 you are not to -- and very able to craft questions that  
14 comply with the Court's rulings. It is your responsibility  
15 as an officer of the court --

16 MR. SPEHR: Understood.

17 THE COURT: -- to comply with the Court's rulings.

18 MR. SPEHR: Understood.

19 THE COURT: I expect --

20 MR. SPEHR: I didn't intend -- I'm sorry.

21 THE COURT: I am speaking now.

22 MR. SPEHR: Yes.

23 THE COURT: That's one of the basic principles of  
24 how we proceed in court. You are to comply with the Court's  
25 rulings. You are not to deviate from the Court's rulings or

Martens - Cross

1 disregard the Court's rulings in order to try to get  
2 evidence into the record that has already been ruled to not  
3 be admissible. Do you understand your responsibilities?

4 MR. SPEHR: I do, Your Honor. I understand. I  
5 did not think I was invading the Court's ruling, but I  
6 understand and I will not ask any further questions around  
7 this area.

8 THE COURT: And I expect you to comply with all of  
9 the Court's rulings.

10 MR. SPEHR: I will do so.

11 THE COURT: And I know of your intelligence. It's  
12 been displayed here in this courtroom. So I know you can  
13 understand the Court's rulings, and you are expected to  
14 understand and follow them.

15 MR. SPEHR: Thank you, Your Honor. I appreciate  
16 that. I will do so.

17 Mr. Herzka, would you put up DD-26, which I  
18 believe there has been no objection to.

19 BY MR. SPEHR:

20 Q. Mr. Martens, can you see that on your screen?

21 A. I can, yes.

22 Q. Okay. Is this a fair depiction of the flow -- the  
23 typical flow of funds structure?

24 A. I would say in terms of the investor depositing  
25 investment funds into the SPE is a first step. That second

Martens - Cross

1 step being from the transfer of those funds to one of the  
2 vendors, to a vendor, Nationwide or Enchanted or the others.  
3 And what's happening next then from a cash flow perspective  
4 is the vendor goes ahead and returns those funds to PCI.

5 MR. SPEHR: Would you click the next one.

6 BY MR. SPEHR:

7 Q. So this is the end of the transaction, PCI to the SPE  
8 account, correct?

9 A. That would be, once again, the cash flow once the money  
10 is there. Typically as the money came into the PCI M&I  
11 account, that money was there maybe and transferred the same  
12 day, no more than a day later back to the -- well, back to  
13 be used then to go ahead and pay off maturing notes to the  
14 SPEs.

15 MR. SPEHR: Would you put up next, Mr. Herzka,  
16 P-764. I believe this has been admitted as a demonstrative,  
17 Your Honor. Let me just ask a foundational question and  
18 then I will offer it.

19 BY MR. SPEHR:

20 Q. This is a flowchart that you created, correct?

21 A. That's correct.

22 Q. And this is contained in your expert report; is that  
23 correct?

24 A. It's been contained in a number of my expert reports,  
25 that's correct.



Martens - Cross

1 Q. And to the best of your knowledge, this is an accurate  
2 depiction of the typical flow of funds?

3 A. It is, yes.

4 MR. SPEHR: I offer P-764 in evidence, Your Honor.

5 MR. ANTHONY: No objection.

6 THE COURT: P-764 is received.

7 MR. SPEHR: Thank you.

8 BY MR. SPEHR:

9 Q. So, again, let's just go through this chart, which I  
10 think you were shown in your direct examination. So, again,  
11 we have the investor on the top, right?

12 A. That's correct.

13 Q. And the investor is transferring money into the special  
14 purpose entity, correct?

15 A. That's correct.

16 Q. And then Step 2, the special purpose entity transfers  
17 funds to the vendor, correct?

18 A. Correct.

19 Q. And when we talk about vendor, we're basically talking  
20 about Nationwide and Enchanted, correct?

21 A. They were the two big ones, but there were others.

22 Q. And the vendor then in Step 3 in the transaction deducts  
23 a commission, right?

24 A. Correct.

25 Q. And then it pays the remainder down to the Petters

Martens - Cross

1 Company, Inc. account at M&I, correct?

2 A. Correct.

3 Q. And then the final stage -- well, there are two more  
4 stages in your chart. Step 4, PCI repays the controlled  
5 investor account at the special purpose entity, correct?

6 A. Correct.

7 Q. And then there's -- I think you talked about this, sort  
8 of a negotiation at the end of the day that resulted in the  
9 special --

10 (Alerts going off from cell phones)

11 MR. SPEHR: I think we have been Amber alerted,  
12 Your Honor.

13 THE COURT: Let's just wait. The record will  
14 reflect that there is an alert that has just gone off in the  
15 courtroom.

16 (Alerts going off from cell phones)

17 MR. SPEHR: Do we think it's over? May I proceed?

18 THE COURT: Yes, you may.

19 MR. SPEHR: Thank you, Your Honor.

20 BY MR. SPEHR:

21 Q. So you talked about this a little bit on your direct,  
22 but basically the last stage or step in the transaction, I  
23 think you have it as Step 6, is there was some transaction  
24 that resulted in the special purpose entity making some  
25 payment back into Petters Company, Inc., correct?

~~Martens - Cross~~

1 A. Well, but you skipped a step, though. You used the term  
2 "negotiation." There was no negotiation with Step 5. Step  
3 5 is the actual return of principal plus interest on the  
4 outstanding promissory note. That was paid at maturity  
5 date.

6 The difference here, though, with Step 6 was that  
7 PCI, per terms of the agreement, per terms of the note,  
8 would put in some money in terms of as like sort of their  
9 investment in the transaction to provide some -- how can I  
10 say? -- additional funding. But then ultimately when the  
11 transaction closed, then would be returned back in Step 6.  
12 Not every time. It was in certain instances that PCI would  
13 actually put the money in. That's all I'm saying. It  
14 wasn't really a negotiation as much as what was understood  
15 between the parties.

16 Q. Very helpful. Thank you. I appreciate that.

17 MR. SPEHR: Now I would like, Mr. Herzka, can you  
18 do -- can you put up P-764 and side by side with PD-14,  
19 please?

20 BY MR. SPEHR:

21 Q. Now you're familiar with PD-14, correct?

22 A. I have been in the courtroom. I've seen PD-14 before.

23 Q. Yeah, it's not something you created, correct?

24 A. That's correct.

25 Q. And looking at PD-14, there is no reference to any SPEs

Martens - Cross

1 in PD-14, correct?

2 A. That's correct.

3 Q. There's no reference to any vendors in PD-14, correct?

4 A. Well, there's a reference to wholesale suppliers in the  
5 second box there using a different term.

6 Q. Well, Nationwide and Enchanted are not referenced here,  
7 are they?

8 A. They're not specifically referenced, that's correct.

9 Q. And this does not show any flow of funds from the  
10 investors to the SPEs to the vendors, does it?

11 A. That's correct.

12 Q. And what -- withdrawn.

13 Now turn to a different subject, Mr. Martens. We  
14 talked about the years that you've been conducting an  
15 investigation into the Petters scheme, correct?

16 A. That's correct.

17 Q. And you've been doing it for, you know, approximately 14  
18 years, correct?

19 A. That's correct.

20 Q. You've looked at an enormous amount of information and  
21 data, correct?

22 A. That's correct. My team.

23 Q. You and your team.

24 And in all your years of conducting your  
25 investigation, is it correct to say that you found no

Martens - Cross

1 evidence that any M&I employee knew about the SPE  
2 structures; is that correct?

3 A. The SPE structures?

4 Q. Right.

5 A. I'm not aware of it -- in terms of -- when I think of it  
6 in terms of an M&I employee with actual knowledge of the  
7 fraud itself, I'm not aware of that, no.

8 Q. My question was: Are you aware of any evidence that  
9 anyone at M&I understood the SPE structures that we just  
10 discussed?

11 MR. ANTHONY: Your Honor, objection, inquiring  
12 about liability issues of a damages expert, which I thought  
13 was off limits.

14 THE COURT: Sustained.

15 MR. SPEHR: I will move on.

16 BY MR. SPEHR:

17 Q. Is it correct to say, Mr. Martens, that by January of  
18 2008, the investors were owed billions of dollars by PCI?

19 A. That's correct.

20 Q. A couple of final questions. I want to talk about --  
21 briefly about the Interlachen, Ritchie, and Palm Beach DAMAs  
22 and DACAs. You understand what those are, right?

23 A. I do, yes.

24 Q. Is it correct to say that the Ritchie DACA was not  
25 executed until after the last Ritchie loan to PCI or PGW?

Martens - Cross

1 MR. ANTHONY: Objection, it goes to both investor  
2 knowledge, to liability causation, and is unrelated to his  
3 opinion on damages.

4 THE COURT: Sustained. Sustained.

5 MR. SPEHR: Oh, I'm sorry. Thank you, Your Honor.

6 BY MR. SPEHR:

7 Q. Let me draw your attention -- I don't think this is in  
8 the binder, so I am going to hand it out. I'm referencing  
9 P-766.

10 MR. SPEHR: If I may approach, Your Honor?

11 THE COURT: You may.

12 (Document handed to witness and the Court)

13 MR. SPEHR: I don't think this is in evidence yet,  
14 so, Mr. Herzka, don't put it up.

15 BY MR. SPEHR:

16 Q. Foundational question, Mr. Martens: Is this a document  
17 that you prepared?

18 A. Yes.

19 Q. And this is a document that's contained in your expert  
20 report, correct?

21 A. For this case, for this matter, that's correct, yes.

22 Q. And what this shows are cash and check payments to the  
23 PCI insiders, correct?

24 A. Well, it's cash and checks made payable to cash, not  
25 just -- well, no, that's not correct, because this is -- the

Martens - Cross

1 individuals that are listed here are not all PCI insiders.

2 Q. Well, Coleman is a PCI insider, right?

3 A. Yes.

4 Q. White is a PCI insider?

5 A. Yes. When you say "Coleman," you mean Deanna Coleman?

6 Q. Yeah, I meant Deanna. Thank you. Because I see there's  
7 another Coleman here.

8 Thomas Petters is an insider?

9 A. He's an insider.

10 Q. Lindstrom is an insider?

11 A. Insider.

12 Q. So just want to -- this reflects checks made out to cash  
13 to these individuals, correct?

14 A. Not necessarily just -- not necessarily checks. There  
15 could be cash, literal cash given to certain of the payees  
16 that are listed on this schedule here.

17 Q. Why don't you tell me what this reflects.

18 A. Okay. First of all, PCI had only five employees; Thomas  
19 Petters, Deanna Coleman, Robert White, Debbie Lindstrom, and  
20 their accountant, Sandy Indahl. Those are the only five  
21 people who worked for Petters Company, Inc.

22 What this schedule reflects is certain individuals  
23 who worked for Petters Company, Inc. were given either cash,  
24 literally cash, or checks made payable to cash. There are  
25 certain other individuals on this schedule that had nothing

Martens - Cross

1 to do with PCI, in certain cases were actually relatives of  
2 Deanna Coleman. And then there are other individuals on  
3 this schedule that were Petters Group Worldwide employees  
4 that worked closely with Thomas Petters.

5 And then there's just other items on here that are  
6 just literally cash and/or petty cash, and I'm not quite  
7 sure who was given those amounts.

8 MR. SPEHR: I offer P-766 in evidence, Your Honor.

9 MR. ANTHONY: No objection.

10 THE COURT: P-766 is received in evidence.

11 MR. SPEHR: If I may have a moment?

12 THE COURT: Yes, you may.

13 (Defendant's counsel confer)

14 MR. SPEHR: No further questions, Your Honor.

15 Thank you.

16 THE COURT: May I just make one clarification?  
17 The bottom of P-766 has a 001. Let's just make a record of  
18 the fact that P-766 is a one-page document.

19 MR. SPEHR: Thank you.

20 THE COURT: You may proceed, Counsel.

21 MR. ANTHONY: Thank you, Your Honor.

22 Ms. Ellig, would you put back up on the screen the  
23 one we were just looking at. Thank you.

24

25



~~Martens - Redirect~~**REDIRECT EXAMINATION**

BY MR. ANTHONY:

Q. Mr. Martens, this Exhibit 766 shows I think you said cash and checks, right?

A. Cash and checks payable to cash.

Q. Does it include any of the tens of millions of dollars in wires we've heard about in this case?

A. No.

Q. Do you know how much was -- went out of the PCI account in wires to Mr. Petters, Ms. Coleman, and Mr. White, for example?

A. I know it was millions and millions of dollars went out in wires to -- certainly to Deanna Coleman and to Tom Petters over the years.

Q. And that's not part of this schedule, though, correct?

A. That's correct. This is just cash and checks payable to cash.

Q. Where did you find all this information that's in 766 that's now in evidence in this case?

A. Well, from the books and records of PCI.

Q. What --

A. If I can, what I think -- what I believe triggered this particular schedule was the fact that Debbie Lindstrom, who testified last week here in court, she was one -- she was probably the first person that I interviewed at PCI. And

~~Hartens - Redirect~~

1 she brought to my attention -- she handed me -- I asked  
2 questions and so forth, and she proceeded to give me her --  
3 a laptop that she had in a drawer in her office. She was  
4 Deanna Coleman's assistant. She actually worked right  
5 outside of Deanna Coleman's office on the third floor at the  
6 Petters Company building there on 4400 Baker Road in  
7 Minnetonka.

8 And her laptop had a spreadsheet on it that Deanna  
9 would go ahead and direct her to go down to a local M&I  
10 branch and bring back cash. And then you'll see in the  
11 account there, 37 instances of that happening. And then  
12 along the way, we also found payments and so forth that  
13 Deanna Coleman made to her brother, Jody Coleman, and I  
14 believe Scott Moellman was her boyfriend.

15 And the trustee -- as we found this information,  
16 the trustee directed that we go ahead and find out any and  
17 all instances where cash and/or checks payable to cash was  
18 used.

19 Q. So did you go to the M&I Bank records to confirm the  
20 accuracy of the information you had?

21 A. Yes.

22 Q. And from looking at the M&I Bank records, what could you  
23 see about -- what did you see that confirmed what you  
24 thought with respect to cash and checks going out of the M&I  
25 Bank account to these various individuals on P-766?

Martens - Redirect

1 A. Well, all the information was tied out; in other words,  
2 we were able to -- the checks, the Deanna checks and so  
3 forth were all written in certain amounts and so forth. So  
4 we were able to tie out the records.

5 Q. So you could see the information on P-766 in the M&I  
6 Bank records when you looked at them?

7 A. Correct.

8 Q. Now let's talk about who Jody Coleman was. Who is Jody  
9 Coleman?

10 A. I believe that's Deanna Coleman's brother.

11 Q. Any idea why Jody Coleman was getting -- what the  
12 business purpose was for that 930,000 to Jody Coleman was  
13 for?

14 A. I have no idea. I suspect it was not a business  
15 purpose.

16 (Alerts going off from cell phones)

17 THE COURT: Counsel, you may proceed.

18 MR. ANTHONY: Thank you, Your Honor.

19 BY MR. ANTHONY:

20 Q. Jody Coleman, her brother, got 930,000 in checks from  
21 Ms. Coleman. What about Scott Moellman? Who is Scott  
22 Moellman?

23 A. I believe that was Deanna Coleman's boyfriend.

24 Q. And her boyfriend, from your review of the records of  
25 M&I Bank, got 275,000 in checks or cash?

Martens - Redirect

1 A. That's correct.

2 Q. We know who Mr. Petters is. We know who Ms. Lindstrom  
3 is. And we have Deanne Anderson, David Margolis. Any idea  
4 who they are?

5 A. Deanne Anderson was Mr. Petters' administrative  
6 assistant, and David Margolis was another assistant --

7 (Alerts going off from cell phones)

8 A. -- another assistant to Mr. Petters.

9 THE COURT: We will suspend testimony until these  
10 alerts are completed.

11 Okay. You may proceed.

12 MR. ANTHONY: Thank you.

13 BY MR. ANTHONY:

14 Q. So, for example, if there was a check in an M&I Bank  
15 record that showed a payment to Jody Coleman, would that be  
16 like in a monthly bank statement that you could find?

17 A. Well, these transactions would be recorded in a monthly  
18 bank statement, that's correct.

19 Q. So if anybody were looking at that monthly bank  
20 statement, either at PCI or at the bank, they could see a  
21 check to Jody Coleman for some substantial amount; is that  
22 correct?

23 A. Well, the checks -- the check wouldn't be made payable  
24 to Jody Coleman. The check would be made payable -- these  
25 checks were made payable to cash. So that's how they were

Hartens - Redirect

1 transacted, and you would see the cash withdrawals on the  
2 bank statements.

3 Q. You were asked a couple of questions about some  
4 investment funds.

5 MR. ANTHONY: Ms. Ellig, would you turn the ELMO  
6 on, please.

7 MS. ELLIG: Do you want help?

8 MR. ANTHONY: I always need help, but not right  
9 now. I will call you if I need it.

10 BY MR. ANTHONY:

11 Q. You were asked questions about the Acorn fund. Do you  
12 remember that?

13 A. Yes.

14 Q. And I think you said Acorn had a loss. According to  
15 your report, was it 138 million? Does that sound right?

16 A. That sounds right.

17 Q. And then I think you were asked about the Lancelot fund.  
18 And how much was the loss of the Lancelot fund?

19 A. I believe it was like over 700 million, like  
20 760-some-odd million.

21 Q. I think I looked at your testimony. It said  
22 764 million. Does that sound right?

23 A. That sounds right.

24 Q. And then you mentioned I think the Palm Beach fund. Do  
25 you recall that?

Martens - Redirect

1 A. Yes.

2 Q. And do you recall how much you said the Palm Beach fund  
3 lost as a result?

4 A. It was 600 -- if I can look at my report, I will be  
5 precise.

6 Q. Yeah, please do.

7 (Witness reviews document)

8 A. Palm Beach was 632 million.

9 Q. So if I add those up -- check my math, please -- it  
10 seems to me that comes to about 1,534,000,000 roughly that  
11 you calculated as the losses suffered by those three funds  
12 that Mr. Kelley is attempting to collect, correct?

13 A. That's correct.

14 Q. And I think your total was 1.926 billion, was it?

15 A. I can give you the exact number.

16 Q. Would you, please.

17 A. \$1,925,748,160.

18 Q. That's the total. So the difference between the  
19 1,534,000,000 and the total, represented losses from other  
20 funds whose names have not been mentioned yet, correct?

21 A. That's correct.

22 Q. And I think you said that the 1,925,748,000 went into  
23 the -- in the Ponzi scheme after December 5th, 2007. Do you  
24 recall that?

25 A. Well, that's correct. In other words, the last

Martens - Redirect

1 outstanding start date of a promissory note was  
2 December 5th, 2007.

3 Q. And did substantially all of this 1.925 billion go  
4 through -- let me rephrase that.

5 How many bank accounts did PCI have at M&I Bank?

6 A. I believe there was 13 to 15, I believe. PCI at M&I,  
7 something like that, 13 to 15.

8 Q. And we've been focusing on the 9018 account, correct?

9 A. That's correct.

10 Q. And how much of this money that went in after -- this  
11 1.925 billion that went in after December 5, 2007, went  
12 through that 9018 account?

13 A. Substantially all of it.

14 MR. ANTHONY: I have nothing further, Your Honor.

15 MR. SPEHR: Nothing from me, Your Honor. Thank  
16 you.

17 THE COURT: The witness is excused, then.

18 THE WITNESS: Thank you.

19 THE COURT: You're welcome.

20 MR. ANTHONY: You can step down, Mr. Martens.  
21 Thank you.

22 THE WITNESS: Thank you, Judge.

23 MR. ANTHONY: Safe travels, sir.

24 Plaintiff rests, Your Honor.

25 MR. MOHEBAN: Good morning, Your Honor. Keith

1 Moheban for BMO Harris Bank.

2 THE COURT: Good morning.

3 MR. MOHEBAN: BMO Harris has a motion it would  
4 like to present to the Court. We're prepared to argue it.  
5 It may be a matter that you want to take up at sidebar in  
6 terms of the procedure.

7 THE COURT: I do wish to take it up outside of the  
8 presence of the jury. I just want to know whether this is a  
9 time for us to excuse the jury from the courtroom or whether  
10 it can be taken up shortly at sidebar.

11 MR. MOHEBAN: We can do it however the Court  
12 prefers.

13 THE COURT: Let's begin with sidebar. Members of  
14 the Jury, we will have a sidebar. Feel free to talk amongst  
15 yourselves about anything other than this case, and feel  
16 free to stretch and stand if that's your pleasure.

17 **(At sidebar)**

18 MR. MOHEBAN: We will present a Rule 50(a) motion.  
19 We have prepared a brief that we will file, but we need to  
20 update it with testimony received today in plaintiff's case.  
21 So once we get the daily -- we will finalize that brief when  
22 we can file it this evening.

23 We're prepared to argue the motion. What I intend  
24 to do, because there are a lot of arguments, is give sort of  
25 a high-level argument of what we think are the most



1 compelling points, which would be about a 15- or 20-minute  
2 argument. We could do that at the lunch hour. I assume  
3 that counsel at some point will want to submit an opposition  
4 and may want to argue in opposition, but we're prepared to  
5 get it into the Court today so you can start considering our  
6 arguments.

7 THE COURT: Okay.

8 MR. MARDER: Your Honor, we defer to you as to the  
9 appropriate procedure. We're at a little bit of a  
10 disadvantage here because we don't know what the basis of  
11 the motion is. So to the extent we are able to, we are  
12 certainly happy to do a preliminary argument today, but we  
13 certainly would like the opportunity to respond to the brief  
14 as well so that our response is complete. And we don't want  
15 to be prejudiced in that the defendant has had obviously a  
16 number of days to prepare this verse we're operating in the  
17 dark and don't know exactly where they stand, so we would  
18 like a few days to respond.

19 THE COURT: Okay. Let's talk about what we will  
20 be doing with the jury in the meantime. How do you propose  
21 to proceed?

22 MR. MOHEBAN: Well, I think we have the jury  
23 impaneled. We will put on our evidence --

24 THE COURT: Okay.

25 MR. MOHEBAN: -- while you are considering the

1 motion.

2 THE COURT: Okay.

3 MR. MOHEBAN: Obviously our position is that you  
4 should enter a directed verdict.

5 THE COURT: I understand your position.

6 MR. MOHEBAN: But we also understand that you are  
7 not going to have the jury wait for two or three days or  
8 whatever it takes for them to respond. So we're prepared to  
9 put on our evidence.

10 THE COURT: At the conclusion of this break?

11 MR. MOHEBAN: Right.

12 THE COURT: Very well. So the matters are taken  
13 under advisement. I will give you some instructions about  
14 how we will -- I will receive your arguments at a later  
15 time, probably --

16 MR. MARDER: Are you contemplating there will be  
17 oral argument today during the lunch break, or are we going  
18 to defer oral argument until the briefing is filed?

19 THE COURT: I would like the benefit of the  
20 briefing --

21 MR. MARDER: Makes sense.

22 THE COURT: -- and so we aren't having additional  
23 argument, which I would expect counsel would --

24 MR. MARDER: So they will just formally make their  
25 motion, and then you will reserve judgment and we will have

1 an argument after the briefing is filed?

2 THE COURT: That's exactly right.

3 MR. MARDER: Thank you, Your Honor. That makes  
4 sense.

5 MR. MOHEBAN: We do -- the 15-minute argument  
6 would highlight some of the most important points. It might  
7 be useful to the Court, but obviously it's up to you.

8 THE COURT: You said the 15 minutes?

9 MR. MOHEBAN: The 15-minute argument that I would  
10 make at the lunch hour might be helpful to focus the Court  
11 on what we think will be the most salient points to  
12 consider, but that's obviously up to you.

13 THE COURT: Well, I think I will hear from  
14 opposing counsel. I'm happy to hear 15 minutes of argument  
15 at the lunch hour with the understanding that that will not  
16 be all of the argument that will be made on these matters --

17 MR. MOHEBAN: Sure.

18 THE COURT: -- and that it will be considered  
19 along with the briefing and other arguments in this case.  
20 Is that agreeable to counsel?

21 MR. MARDER: Your Honor, we'll defer to you again,  
22 but it seems to me that if there's going to be briefing and  
23 then further argument, having an argument today to highlight  
24 certain points is just going to take up extra time. We have  
25 the jury here, and we don't want to impose on them. And it

1 seems a more efficient process to just do it like you do  
2 with any other motion, which is to have briefing and then  
3 have argument on it. And having a preargument that  
4 highlights certain points seems redundant and seems to be a  
5 waste of the Court's and the jurors' time.

6 MR. MOHEBAN: We would do it during the lunch hour  
7 so it wouldn't waste the jury's time. But it's obviously  
8 what's most helpful to you is what we'll do.

9 THE COURT: I think I'm persuaded that it would be  
10 redundant. I will have all of the argument at the time that  
11 I have all of the briefing and can fairly consider all of  
12 the arguments at the same time --

13 MR. MARDER: Thank you, Your Honor.

14 THE COURT: -- and be well prepared for that.

15 MR. MOHEBAN: So I do want to make sure we have  
16 presented the argument or the motion today.

17 THE COURT: Yes.

18 MR. MOHEBAN: We all agree we've sufficiently  
19 presented it?

20 MR. MARDER: Yes, Your Honor, we agree that by  
21 saying he's moving for JMOL and that Your Honor giving him  
22 leave to file a brief constitutes his motion that he is  
23 required to make under the rules. We are not saying that  
24 they have waived anything by only doing a preliminary  
25 statement that they are moving and filing a brief later.

1 MR. MOHEBAN: Good.

2 THE COURT: We are all settled.

3 MR. MARDER: Thank you, Your Honor.

4 THE COURT: Thank you, Counsel.

5 **(In open court)**

6 MR. GLEESON: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. GLEESON: Our first witness is Jeanne Crain.

9 We just have some -- the typical notebook filing and  
10 unraveling. It will just take a moment. Ms. Crain is here.

11 THE COURT: Thank you, Counsel.

12 MR. MOHEBAN: Your Honor, while we're getting set  
13 up, it occurs to me there's one item we didn't address at  
14 the sidebar. That since we have a moment here, could I  
15 impose on you to ask about that one more time at the  
16 sidebar?

17 THE COURT: You may.

18 **(At sidebar)**

19 MR. MOHEBAN: One of my colleagues reminded me  
20 that we should set a timing for the briefing, how much time  
21 they get and then if we are going to have a reply.

22 MR. MARDER: Your Honor, it seems to me that if  
23 they are going to be moving -- I think you said you would  
24 move tonight.

25 MR. MOHEBAN: Yes.

1 MR. MARDER: We would like until Friday to file a  
2 response, and we don't think it's necessary to have a reply.  
3 I mean, on a JMOL, typically you don't have a whole briefing  
4 set up with a reply; and since we're the party against whom  
5 the motion is filed, it seems to me that we should have the  
6 last word on that. So I would just propose that they file  
7 their brief tonight and we file our response on Friday.

8 THE COURT: Okay. I'm happy to hear from you.

9 MR. MOHEBAN: Well, it's a dispositive motion, so  
10 the rules call for a reply.

11 THE COURT: Um-hmm.

12 MR. MOHEBAN: And Friday is a little late. We  
13 will be almost done with the trial, I think, if we wait that  
14 long, so I was hoping they could do it by Thursday.

15 THE COURT: Understood.

16 MR. MARDER: What time on Thursday?

17 THE COURT: You will get notice.

18 MR. MARDER: Thank you.

19 **(In open court)**

20 MR. GLEESON: Judge, can Mr. Burger approach with  
21 the set of documents for you?

22 THE COURT: Yes.

23 (Binders handed to Court)

24 THE COURT: Members of the Jury, we will be  
25 breaking for lunch at 12:15.

Crain - Direct

1 MR. GLEESON: If you could remain standing,  
2 Ms. Crain, while the Court administers the oath.

3 (Witness sworn)

4 THE COURT: Please state your full name and spell  
5 your last name.

6 THE WITNESS: Jeanne Crain, C-r-a-i-n.

7 THE COURT: Thank you. You may be seated.

8 COURT REPORTER: Excuse me. If you could also  
9 spell your first name.

10 THE WITNESS: Sure. J-e-a-n-n-e.

11 MR. GLEESON: May I, Your Honor?

12 THE COURT: Yes, you may.

13 **(Jeanne Crain)**

14 **DIRECT EXAMINATION**

15 BY MR. GLEESON:

16 Q. Ms. Crain, could you pull the base of that microphone a  
17 little closer to you so everyone can hear you.

18 A. Okay.

19 Q. Thank you very much.

20 Good morning.

21 A. Good morning.

22 Q. Are you currently employed?

23 A. I am.

24 Q. By whom?

25 A. Bremer Bank.

Crain - Direct

1 Q. What's your position at Bremer Bank?

2 A. I am president and CEO.

3 Q. Do you hold any other positions?

4 A. I'm on a variety of different boards.

5 Q. Can you tell us what boards you're on, Ms. Crain.

6 A. I'm on the Federal Reserve Bank of Minneapolis. I'm a

7 board of director there. I'm on the St. Paul Downtown

8 Alliance Board. I'm on the Minnesota Business Partnership

9 Board. And I'm on the board for the YMCA of the North.

10 Q. Okay. Can you tell us about the Federal Reserve Bank of  
11 Minneapolis. What is that position? You're a board member  
12 there?

13 A. Yes, I am.

14 Q. Okay. And first things first. You're president and CEO  
15 of Bremer Bank?

16 A. Correct. And I am on that board as well.

17 Q. And what is the Federal Reserve Bank of Minneapolis?

18 A. It's one of the 12 district banks that make up the  
19 Federal Reserve system, which is the central banking system  
20 for the United States.

21 Q. And what does it do?

22 A. Essentially the Federal Reserve is the -- is charged to  
23 set interest rates, you know, establish monetary policy to  
24 manage both pricing stability, manage inflation, and  
25 maximize employment, is the mandate.



Craig - Direct

1 Q. And are you on any committees in the Federal Reserve  
2 Bank of Minneapolis?

3 A. I chair their audit committee.

4 Q. How many board members are there on the Federal Reserve  
5 Bank of Minneapolis?

6 A. There are nine board members.

7 Q. And you may have said this already, but how many  
8 regional Federal Reserve banks are there in the United  
9 States?

10 A. There's 12 total.

11 Q. You mentioned you're on the board of the St. Paul  
12 Downtown Alliance?

13 A. Yes.

14 Q. What is that?

15 A. It's an organization that is really about creating a  
16 strong economy and supporting all the businesses and really  
17 the residents that live in the downtown St. Paul area.

18 Q. And the Minnesota Business Partnership, you mentioned  
19 you're on the board of directors of that organization?

20 A. Yes.

21 Q. And briefly, high level, can you tell us what that  
22 organization does.

23 A. Yes. It's a group of CEOs and higher-level executives  
24 from across the state of Minnesota, again, focused on the  
25 economic health, well-being of the state.

Craig - Direct

1 Q. And are you on any committees of the board of the  
2 St. Paul Downtown Alliance?

3 A. Yes. I'm on their executive committee.

4 Q. How long have you been the CEO of Bremer Bank?

5 A. Since the fall of 2016.

6 Q. How large a bank is Bremer Bank?

7 A. We are 16 billion in total assets.

8 Q. Did you ever work at M&I Bank?

9 A. I did.

10 Q. When?

11 A. I worked at M&I from June of 2007 until May of 2012.

12 Q. What was your position at M&I Bank when you first joined  
13 the bank?

14 A. When I first started, I was -- I headed up their  
15 business banking group.

16 Q. What were your duties -- again, high level, generally  
17 speaking, what were your duties as the head of the business  
18 banking group at M&I Bank?

19 A. I oversaw managers of bankers, so I oversaw a group of  
20 individuals that were called team leaders and those  
21 individuals managed bankers. We worked to support  
22 businesses, you know, that were in our portfolio to both  
23 manage existing customers and seek new ones for the bank as  
24 well.

25 Q. So you supervised team leaders?

Crain - Direct

1 A. I did.

2 Q. And the team leaders supervised business bankers?

3 A. That's correct.

4 Q. And can you tell us generally, what was the province  
5 within the bank of the business banking division?

6 A. I'm sorry. What was the question?

7 Q. Were there other divisions besides business banking?

8 A. Yes. There were a number of other departments within  
9 the region of Minnesota. Commercial real estate was a  
10 group. Commercial banking was a group. Wealth management  
11 was a group.

12 Q. And can you describe what it was that the business  
13 banking group did as opposed to commercial banking, for  
14 example.

15 A. The business banking group largely -- our business  
16 opportunity was to work with customers that had revenues of  
17 25 million or less.

18 Q. And was that a hard-and-fast rule in terms of divvying  
19 up the customers of the bank?

20 A. Not necessarily. Some of those relationships followed a  
21 banker who they had been working with in the past. M&I was  
22 made up of a number of different organizations that they had  
23 purchased in the Twin Cities, so some of those relationships  
24 followed the banker. But when we were seeking new  
25 relationships, often that was the delineating amount.

Crain - Direct

1 Q. Was there any such thing in the M&I Bank when you were  
2 there as a small business banking group?

3 A. No.

4 Q. You mentioned that the team leads you supervised in turn  
5 supervised other business bankers?

6 A. That's correct.

7 Q. And in addition to those supervisory responsibilities,  
8 did the team leads have their own portfolios?

9 A. Yes, they did.

10 Q. So they both supervised business bankers and acted as  
11 business bankers themselves; is that fair to say?

12 A. That is correct.

13 Q. Did they typically -- did the team leads typically have  
14 smaller portfolios than the business bankers they  
15 supervised?

16 A. Yes, because they were -- they had other scope of  
17 responsibilities, yes.

18 Q. And you supervised the team leads?

19 A. I did.

20 Q. Did you have a separate portfolio of customers yourself?

21 A. I did not.

22 Q. Did you directly supervise Chris Flynn?

23 A. I did.

24 Q. Did you directly supervise Ed Jambor?

25 A. I did not.

Crain - Direct

1 Q. Was there a reason you didn't supervise Ed Jambor?

2 A. Ed was not a team lead. He was a banker.

3 Q. And did you overlap your -- could you remind the jury  
4 when you arrived at M&I Bank.

5 A. In June of 2007.

6 Q. And did you overlap, did your tenure overlap with that  
7 of Ed Jambor?

8 A. I think for a very short while. I think he left soon  
9 after I joined the bank. Not sure exactly when he left.

10 Q. But he was in your department?

11 A. Yes. He was a business banker.

12 Q. And under whose supervision was he during that brief  
13 period?

14 A. Chris Flynn.

15 Q. Okay. Let's back up a bit. Where do you live,  
16 Ms. Crain?

17 A. In Minneapolis, Minnesota.

18 Q. Were you born here?

19 A. I was not.

20 Q. Where were you born?

21 A. I was born in New Rockford, North Dakota.

22 Q. And did you grow up in North Dakota?

23 A. I did.

24 Q. When did you move -- when did you first move to the Twin  
25 Cities?

Crain - Direct

1 A. I moved to the Twin Cities in December of 1990.

2 Q. And what occasioned your move to the Twin Cities from  
3 North Dakota?

4 A. I actually moved from Milwaukee, Wisconsin, but I moved  
5 to take a job with Marquette Bank.

6 Q. And are you married?

7 A. I am.

8 Q. Your husband's name?

9 A. Peter Crain.

10 Q. And high level, what does -- does he work outside the  
11 home?

12 A. He does.

13 Q. And what does he do?

14 A. He has his own business. He's a home builder, a general  
15 contractor.

16 Q. And do you have children?

17 A. I do.

18 Q. How many?

19 A. I have three sons.

20 Q. And ages?

21 A. 22, 25, and 28.

22 Q. And do they all live in the Twin Cities area?

23 A. They do.

24 Q. What do they do, briefly?

25 A. My oldest son is in a financial planning capacity, my

Crain - Direct

1 middle son does recruiting for -- is an HR executive, and my  
2 youngest son is an engineer.

3 Q. Did you go to high school in North Dakota?

4 A. I did.

5 Q. College?

6 A. Undergraduate, yes.

7 Q. And when did you graduate?

8 A. From college, in 1982.

9 Q. And what college did you go to?

10 A. University of North Dakota.

11 Q. Your degree was in what?

12 A. Banking and finance.

13 Q. And did you get a job after graduating from college?

14 A. I did.

15 Q. What was your first job?

16 A. My first job was as a commercial loan trainee.

17 Q. At a bank?

18 A. Yes.

19 Q. What bank was it?

20 A. It was at First Bank Grand Forks, North Dakota.

21 Q. And how long did you have that position, Ms. Crain?

22 A. I was there for about five years.

23 Q. Was there anything in particular that drew you to  
24 banking?

25 A. My parents owned a small business. I had, you know,

Craig - Direct

1 worked in my parents' business. I was interested in just  
2 the -- what it took to run a business. I loved accounting  
3 and I loved math and, you know, economics, but I didn't  
4 really want to be an accountant. And with my degree, I just  
5 found my way into banking and working with business owners.

6 Q. And did you like it when you first started?

7 A. Yeah, I really did.

8 Q. Do you still like it?

9 A. I do.

10 Q. How long have you been a banker?

11 A. 40 years.

12 Q. After that first position in Grand Forks, where did you  
13 go from there professionally?

14 A. I moved to Milwaukee, Wisconsin. I wanted to go to  
15 graduate school. This was in the '80s. There weren't a lot  
16 of evening programs available, so I found one in Milwaukee  
17 so I could work full-time in banking as well.

18 Q. And so did you go to graduate school at night?

19 A. I did.

20 Q. How long did that take?

21 A. About two and a half years.

22 Q. And where were you working during those two and a half  
23 years when you were getting your MBA?

24 A. When I first moved to Milwaukee, the bank I worked for  
25 was Marine Bank. During the time I was there it was



Crain - Direct

1 purchased by Banc One.

2 Q. And when did you get your MBA?

3 A. In December of 1989.

4 Q. And you testified earlier you moved to the Twin Cities  
5 in 1990 for a job opportunity?

6 A. Correct.

7 Q. What was that opportunity, Ms. Crain?

8 A. I headed up the private banking group for Marquette Bank  
9 Minneapolis.

10 Q. And what is private banking?

11 A. It's banking largely for more complex needs of high net  
12 worth individuals.

13 Q. And how long did you work at Marquette Bank Minneapolis?

14 A. I was at Marquette Bank Minneapolis from 1990 until that  
15 bank was sold in 1992. I stayed with the Marquette  
16 organization, but it was a new bank at that time.

17 Q. And what bank -- do you recall what bank that was that  
18 you went to after the acquisition?

19 A. Yes. There was a bank that I helped be part of the  
20 start of, a de novo bank, a brand start-up bank, and that  
21 was in 1992 until that bank was sold in 2002.

22 Q. Banks get sold pretty frequently; is that correct?

23 A. Pardon me?

24 Q. Banks are often bought and sold --

25 A. Yes.

Chain - Direct

1 Q. -- is that fair to say?

2 A. Yes. I have experienced that, yes.

3 Q. Where did you go from there?

4 A. In 2002, when the bank was sold, I took a job with Excel  
5 Bank.

6 Q. Okay. And what was the position you had at Excel Bank?

7 A. I went in as an executive vice president and on their  
8 board as well.

9 Q. So you were on the board of directors and you were an  
10 executive vice president?

11 A. Correct.

12 Q. Did there come a point when Excel Bank was sold?

13 A. Yes.

14 Q. To whom or to what?

15 A. Excel was sold to M&I Bank in 2007.

16 Q. And was that what occasioned your joining M&I Bank in  
17 June of 2007?

18 A. That's correct.

19 Q. How long did you work at M&I Bank?

20 A. I left M&I Bank, which had been sold to BMO Harris, in  
21 2011. I left there when it was BMO in 2012.

22 Q. And at the time you left BMO Harris Bank, what was your  
23 position?

24 A. I was president of the Twin Cities region.

25 Q. Did you leave BMO Harris Bank to go to Bremer Bank?

Crain - Direct

1 A. I did.

2 Q. Did you start as CEO and president of Bremer Bank in  
3 2012?

4 A. No. I was president and CEO -- it was then Bremer Bank  
5 of the Twin Cities. Bremer still had nine separate banking  
6 charters. That all combined during the time after I joined  
7 the bank. But I went in as a CEO and president of one of  
8 those charters for Bremer.

9 Q. And then they were all consolidated?

10 A. Correct.

11 Q. And you're the CEO of the consolidated banks that are  
12 now called Bremer Bank?

13 A. Correct.

14 Q. Let's go back to when you joined M&I Bank in June of  
15 2007. Could you tell us what the duties and  
16 responsibilities of a business banking manager were,  
17 generally speaking, at that period of time.

18 A. It was really to work with our team leads and bankers to  
19 both take care of our customers, work with our peers  
20 throughout the region to deepen relationships with our  
21 customers, and to find new opportunities for the bank as  
22 well.

23 Q. About how many direct supervisees, team leads did you  
24 have during that period?

25 A. I believe it was about four or five, five or so people.

Chain - Direct

1 Q. And it varied from time to time?

2 A. Yes.

3 Q. Okay. And same question. Generally speaking,  
4 approximately how many business bankers were under the  
5 supervision of each of the team leads?

6 A. I believe anywhere from probably five to seven bankers.

7 Q. And tell us about your typical day. What would you do  
8 on a typical day as the business banking manager?

9 A. Sure. I would work -- I would talk with bankers. I  
10 would on occasion meet with customers, go along with bankers  
11 on sales calls. I would have meetings with my peers. I  
12 would have meetings with -- sales meetings with the team  
13 leads in our group. It was all about how we were developing  
14 and managing the business.

15 Q. And when you say your "peers," who are you referring to?

16 A. Individuals like myself that were heading up different  
17 groups, like the individual heading up commercial banking  
18 and/or commercial real estate groups.

19 Q. Did you regularly meet with the team leads that were  
20 under your direct supervision?

21 A. Yes.

22 Q. And how frequently, approximately?

23 A. We had sales meetings I believe weekly, and then I would  
24 have one-on-one meetings with them at least once a month or  
25 so.

Craig - Direct

1 Q. Where was your office at the time?

2 A. It was in downtown Minneapolis.

3 Q. And the business banker team leads under your  
4 supervision, were they also in downtown Minneapolis?

5 A. Some were. Not all.

6 Q. And the others, where were they?

7 A. They were at some of our branch locations throughout the  
8 metro area.

9 Q. One of your team lead supervisees was Chris Flynn,  
10 correct?

11 A. Yes.

12 Q. What was the purpose of your individual meetings with  
13 your team leads, generally, not Chris Flynn specifically,  
14 but your team leads generally, what were your goals when you  
15 met with them?

16 A. Really just to understand how -- it was largely their  
17 agenda -- how they were working with their bankers,  
18 achieving their goals, talking about challenges,  
19 opportunities, just anything they were working with to help  
20 manage and grow the business.

21 Q. You testified a few moments ago that on occasion you  
22 would go with them to meet customers?

23 A. Yes, I did.

24 Q. When that happened -- withdrawn.

25 What purposes might be served by you or were

Crain - Direct

1 served by you going to meet customers with team leads?

2 A. Because of my role, it was to reinforce M&I's interest  
3 in the customer, to talk about our organization overall with  
4 our capabilities, solutions, our presence in the market, our  
5 interest in growing here. So to reinforce M&I's status and  
6 capability of working with customers.

7 Q. As a general matter, when you would go with a team lead  
8 to meet a customer or with a business banker to meet a  
9 customer, was that at your instance or at their instance?

10 A. It would have been at their request.

11 Q. They would ask you to join them on -- for a visit with a  
12 customer?

13 A. Yes.

14 Q. Were you aware at the time back in -- from June of 2007  
15 through the end of 2008, that's the focus period --  
16 withdrawn.

17 Did you know that Petters Company, Inc. was a  
18 customer of the M&I Bank business banking section during  
19 that period?

20 A. Yes.

21 Q. Okay. And for the most part I will focus your attention  
22 on that period between June of 2007 and towards the end of  
23 2008. Okay?

24 A. Okay.

25 Q. And if I refer to that entity as PCI, you're okay with

Chris - Direct

1 that? You will understand what I am referring to?

2 A. Yes.

3 Q. Were you familiar with Tom Petters?

4 A. I knew of Tom Petters, yes.

5 Q. Okay. Back then did you know him personally?

6 A. No, I did not.

7 Q. Did you ever go on a visit with Chris Flynn or any other  
8 banker to PCI's offices?

9 A. I did not.

10 Q. Did you -- you didn't know Tom Petters personally?

11 A. No.

12 Q. You knew of him?

13 A. Yes.

14 Q. Did you associate him with any other business entities  
15 besides PCI?

16 A. Yes. I generally knew that he had a number of different  
17 entities, like, with warehousing companies and I think there  
18 was an affiliation with Sun Country Airlines, Fingerhut. He  
19 had done some acquisitions, some relatively significant  
20 acquisitions, yes.

21 Q. And there came a point when PCI was in Chris Flynn's  
22 portfolio, correct?

23 A. Yes.

24 Q. Okay. Do you know whose portfolio he was in prior to  
25 the time he came into Chris Flynn's portfolio?

Crain - Direct

1 A. Yes. I believe it was Ed Jambor's.

2 Q. Okay. And Ed Jambor left the bank and Chris Flynn took  
3 over that account, that customer?

4 A. That's correct.

5 Q. As a general matter did you, as the business banking  
6 manager, have responsibilities for placing particular  
7 customers in particular bankers' portfolios?

8 A. No. I would have relied on the team leads to do that  
9 work.

10 Q. Was there any exception in that regard with PCI?

11 A. No.

12 Q. So you're in the business -- the banking business for  
13 40 years?

14 A. Yes.

15 Q. Can you tell us, based on your experience, what goes  
16 into being a good business banker, Ms. Crain.

17 A. Someone who is interested in the customer they are  
18 working with, someone who is interested in being out in the  
19 marketplace selling and sharing the capabilities of the  
20 organization that they're working for, someone who is  
21 curious and, you know, loves working with people on a  
22 relationship kind of basis.

23 Q. You mentioned selling. What did you mean by "selling"?

24 A. Well, bankers are largely charged with understanding  
25 what solutions and capabilities they can bring to a new



Craig - Direct

1 relationship to grow the business opportunity for the bank,  
2 and that involves selling whether it's deposits or loans or  
3 other solutions that the bank has to offer.

4 Q. Okay. Is that known as cross-selling?

5 A. There's an element of cross-selling in that process,  
6 yes.

7 Q. Okay. There's more to selling than just cross-selling,  
8 I take it?

9 A. Yes.

10 Q. All right. And is selling and cross-selling --  
11 withdrawn.

12 Was that important when you were at M&I Bank, that  
13 the business bankers sell and cross-sell?

14 A. Very much, yes.

15 Q. Why?

16 A. It was how the -- the bank was interested in growing in  
17 the Twin Cities. M&I was a newer presence and very much  
18 interested in expanding their market share.

19 Q. And was that desire on the part of M&I Bank, in your  
20 experience, unique to M&I Bank?

21 A. No. It's what all banks hope to achieve.

22 Q. Has it been true at every bank that you have worked at?

23 A. That I have worked for, yes.

24 Q. Are business bankers given training to help them excel  
25 at selling and cross-selling?

Crain - Direct

1 A. Yes.

2 Q. What kind of training?

3 A. There's sales training offered. Individual coaching,  
4 that was part of my responsibility as a leader of a business  
5 unit, was to work with bankers in that capacity.

6 Q. Is cross-selling good for a bank?

7 A. Yes, it is.

8 Q. Okay. Selling is good for a bank as well?

9 A. Yes, it is.

10 Q. Why is cross-selling good for a bank?

11 A. Cross-selling, in the vernacular in which we use it, is  
12 to deepen relationships. So you are introducing other  
13 capabilities of the bank to expand a relationship with the  
14 customer, and it's what we call -- it makes a relationship  
15 sticky. It's harder to move because you have more that  
16 you've offered to that customer in terms of under one roof,  
17 under your own organization.

18 Q. Helps you keep or hang on to the customers that you  
19 already have?

20 A. Correct.

21 Q. All right. Is cross-selling good for the customers?

22 A. Yes. It's where you are adding value to their  
23 relationship beyond a single need based on what they may  
24 need to run their business.

25 Q. Let's turn to compensation. Did business bankers at M&I

Craig - Direct

1 Bank while you were there receive salaries?

2 A. Yes, they did.

3 Q. And was that the majority of their compensation?

4 A. Base salary would have been the majority, yes.

5 Q. Did business bankers receive commissions when they  
6 successfully cross-sold products of the bank?

7 A. No, I wouldn't describe it as commissions. They had an  
8 annual bonus opportunity, but not on a commission basis for  
9 single products.

10 Q. Got it. So there were at least two components to their  
11 compensation, their salary and their bonus, correct?

12 A. Correct.

13 Q. Were there any other components besides those?

14 A. I believe there was on occasion, depending -- it wasn't  
15 always consistent, but on occasion there was an opportunity  
16 for some stock options.

17 Q. Okay. Did that happen every year?

18 A. I just can't --

19 Q. Withdrawn.

20 A. -- recall.

21 Q. Did the bonuses happen every year?

22 A. Yes.

23 THE COURT: Counsel?

24 BY MR. GLEESON:

25 Q. And the -- what proportion, roughly, of the total pay of

Craig - Direct

1 a business banker did the bonus consist of?

2 A. The bonus? To the best of my recollection, it was maybe  
3 15 to 20 percent.

4 THE COURT: Counsel, this is a good time for us to  
5 break for our lunch break and so we will take a one-hour  
6 lunch break.

7 Members of the Jury, please be prepared to come  
8 back to the courtroom at 1:15.

9 And certainly to our witness, you are free to go  
10 for a lunch break. Please be prepared to come back to the  
11 courtroom at 1:15. We will resume your testimony at that  
12 time.

13 THE WITNESS: Thank you.

14 THE COURT: Remember our instructions and please  
15 continue to follow them, Members of the Jury.

16 All rise.

17 (Jury excused)

18 **IN OPEN COURT**

19 **(JURY NOT PRESENT)**

20 THE COURT: We are in recess. Have a good lunch.

21 (Lunch recess taken at 12:15 p.m.)

22 \* \* \* \* \*

23 (1:18 p.m.)

24 **IN OPEN COURT**

25 **(JURY PRESENT)**

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1 THE COURT: Thank you. Please be seated. I do  
2 have one housekeeping matter that I want to address with the  
3 jury and the parties at this time.

4 The Court will be in recess next week from Monday,  
5 October 31st, through Wednesday, November 2nd. And we'll  
6 resume the trial at 8:30 on Thursday, November 3rd. So for  
7 your planning purposes, we will not be in court on Monday,  
8 October 31st, through Wednesday, November 2nd. We'll resume  
9 on November 3rd.

10 Okay. Are we ready to go?

11 MR. GLEESON: Yes. May I?

12 THE COURT: Yes, you may.

13 MR. GLEESON: Thank you, Your Honor.

14 BY MR. GLEESON:

15 Q. Ms. Crain, as part of your duties as manager of the  
16 business banking section, did you conduct evaluations of the  
17 team leads under your supervision?

18 A. Yes, I did.

19 Q. Okay. Regularly?

20 A. Yes. We had a formal evaluation at least annually.

21 Q. Okay. And in what intervals? Annually?

22 A. Yes.

23 Q. Okay. And did you provide feedback to your team leads  
24 throughout the year in addition to the formal evaluations at  
25 the end of the year?

Crain - Direct

1 A. Yes, absolutely.

2 Q. Okay. And you evaluated Chris Flynn's performance,  
3 correct?

4 A. Yes, I did.

5 Q. Was he good at his job?

6 A. Yes, he was.

7 Q. Was he good with his customers?

8 A. Yes, he was.

9 Q. Good with his colleagues?

10 A. Yes, he was.

11 Q. Is he a solid banker?

12 A. Yes.

13 Q. Was there ever an instance in which, in your judgment,  
14 he put the bank at risk?

15 A. No.

16 Q. PCI was one of Chris Flynn's customers. It was in his  
17 portfolio; is that correct?

18 A. Yes, that's correct.

19 Q. Was it his most profitable customer?

20 A. No, it was not.

21 Q. You are familiar with ACE Reports?

22 A. Yes, I am.

23 Q. You ran across those in your capacity as a business  
24 banking manager at M&I Bank?

25 A. Yes. We used those, yes.

Crain - Direct

1 Q. Okay. Did you have a chance to review any of  
2 Mr. Flynn's ACE Reports -- withdrawn.

3 There were ACE Reports for particular bankers,  
4 correct?

5 A. Yes.

6 Q. And they covered the customers in that banker's  
7 portfolio?

8 A. Yes, that's correct.

9 Q. Were there other ACE Reports as well?

10 A. Yes. There were reports that rolled up kind of on a  
11 unit basis, so for the whole business banking group and then  
12 for the region as well.

13 Q. Okay. And the unit would cover just the Minnesota --  
14 what would the unit cover?

15 A. Yeah, so it would be business banking within the  
16 Minnesota region, would be one example.

17 Q. Okay. And then there were regional ACE Reports as well?

18 A. That's correct.

19 MR. GLEESON: Let me ask Mr. Herzka to pull up  
20 Defendant's Exhibit 40296 in evidence, which is -- if you  
21 could focus on the top.

22 BY MR. GLEESON:

23 Q. Recognize this, Ms. Crain?

24 A. Yes, I do.

25 Q. Okay. Is this an individual ACE Report or a regional

Craig - Direct

1 ACE Report?

2 A. This would be an individual ACE Report for Chris Flynn.

3 Q. Okay. And you see his name next -- up there next to --

4 MR. GLEESON: If you can go up higher.

5 BY MR. GLEESON:

6 Q. Okay. He's the officer and he was also, you mentioned,  
7 a team lead at the time, correct?

8 A. That's correct.

9 Q. But you are there as his supervisor, a senior manager,  
10 correct?

11 A. Correct.

12 Q. Okay. And -- well, we've learned how to read these in  
13 the course of the trial.

14 So let me just have you direct your attention,  
15 with Mr. Herzka's benefit, to the Petters Company, Inc.  
16 section of the report. He will enlarge that for you. Can  
17 you see that okay?

18 A. Yes, I can.

19 Q. Okay. There were multiple accounts within the Petters  
20 Company, Inc. relationship that are listed there, correct?

21 A. That's correct.

22 Q. Looks like one, two, three, four, five, six. Do you see  
23 that?

24 A. Yes, I do.

25 Q. Are you familiar with the one on the bottom that says,



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1 "FAC Acquisition, LLC?"

2 A. Yes, I believe that was the Fingerhut acquisition.

3 Q. Okay. That was related to the acquisition of Fingerhut  
4 by Tom Petters?

5 A. Correct.

6 Q. Okay. And the total profit to the bank from the Petters  
7 Company, Inc. portfolio, including all six of those accounts  
8 for the preceding year, the rolling 12 preceding year, was  
9 what?

10 A. \$100,682.

11 Q. Okay. And then there's -- within that, there's a  
12 Petters Company, Inc. account. Do you see that?

13 A. Yes, I do.

14 Q. And you understand that to be the focus of this case,  
15 correct?

16 A. That's correct.

17 Q. Okay. And the profit in the previous 12 months from  
18 that account to M&I Bank was what?

19 A. \$57,916.

20 Q. Okay. And we can tell from this that in terms of  
21 profitability, PCI or the Petters Company, Inc. accounts  
22 were fourth in line in profitability in the portfolio of  
23 Mr. Flynn, correct?

24 A. That is correct.

25 Q. Okay. You mentioned there were ACE Reports that covered

Craig - Direct

1 the region as a whole?

2 A. Yes.

3 Q. Okay. You have before you, and counsel have, a big book  
4 of reports. Do you see them up there before you? It should  
5 say, "Regional ACE Reports."

6 A. Yes, I have that.

7 Q. Okay. And you had a chance to review those -- that  
8 volume of reports before you came to court, correct?

9 A. I did, yes.

10 Q. Okay. And could you tell us, broadly speaking, what's  
11 in there?

12 A. It's just a list of, you know, like, the different  
13 reports over the course of time, the ACE Reports showing  
14 profitability of various customers in the portfolios.

15 Q. For the region?

16 A. For the region, yes.

17 Q. Okay. And is it a list or is it the actual ACE Reports  
18 themselves?

19 A. It's the actual reports themselves.

20 Q. Okay. And they were on what -- were they monthly  
21 records? Weekly reports? Do you recall?

22 A. I believe they were monthly reports.

23 Q. Okay. And there's a bunch of them in that volume,  
24 correct?

25 A. That's correct.

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1 Q. Okay.

2 MR. GLEESON: I've got -- we did this earlier,  
3 Judge, with the earlier ACE Reports, where rather than move  
4 into evidence -- and I'm not going to spend much time on  
5 this at all, the Court will be happy to hear. I'm going to  
6 move into evidence all of those reports, and their exhibit  
7 numbers are set forth on DX-40496.

8 So, to sum up, I want to offer into evidence the  
9 18 ACE Reports whose exhibit numbers are set forth on  
10 Defendant's Exhibit 40496, which, if I may approach, I'll  
11 hand up to the Court?

12 THE COURT: Please. And does opposing counsel  
13 have a copy?

14 MR. GLEESON: Yes.

15 (Document handed to the Court.)

16 THE COURT: Thank you.

17 MR. LAWRENCE: Your Honor, we'll object on  
18 foundation as to those reports that precede Ms. Crain's  
19 employment at M&I and on relevance as to those that postdate  
20 September 2008.

21 THE COURT REPORTER: Can I get your name? Sorry.

22 MR. LAWRENCE: Yes, Ryan Lawrence for the trustee.

23 THE COURT: Do you wish to be heard, Counsel?

24 MR. GLEESON: I'm sorry?

25 THE COURT: Do you wish to be heard?

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1 MR. GLEESON: I'll lay additional foundation.

2 THE COURT: Please.

3 MR. GLEESON: May I?

4 THE COURT: You may.

5 BY MR. GLEESON:

6 Q. Okay. These regional ACE Reports, Ms. Crain, were they  
7 kept in the regular course of the business of M&I Bank?

8 A. Yes, they were.

9 Q. Okay. And were they deployed, that is, used, in the  
10 regular course of the business of the bank?

11 A. Yes, they were.

12 MR. LAWRENCE: Objection, foundation as to  
13 preceding her employment.

14 MR. GLEESON: I'm not done with the foundation,  
15 but if I may?

16 THE COURT: Please.

17 BY MR. GLEESON:

18 Q. Okay. The -- did you use these ACE Reports yourself as  
19 the head of the business banking division at M&I Bank?

20 A. Yes. I -- yes, I did.

21 Q. Okay. And did you use these ACE Reports in the moment,  
22 that is, on a particular month would you review an ACE  
23 Report to help you perform your duties as supervisor of the  
24 team leads?

25 A. Yes, I would.

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1 Q. Okay. Were these kept in the regular course of  
2 business --

3 A. Yes.

4 Q. -- of M&I Bank?

5 A. Yeah.

6 Q. From time to time did you have occasion to resort and --  
7 excuse me, to read, consult with ACE Reports prior to your  
8 time at the bank?

9 A. I don't recall specifically.

10 Q. Okay. At the -- during your time at the bank you used  
11 them on a regular basis, correct?

12 A. Yes, I did.

13 Q. Okay. Were they required to be maintained by the bank  
14 in the regular course of its business?

15 A. Yes, they were.

16 Q. Okay. And the data that came into the reports was data  
17 that was collected within the bank under bank senior  
18 management's supervision in order to provide data to you and  
19 the business bankers under your supervision?

20 A. That's correct.

21 Q. Okay. The --

22 MR. GLEESON: Judge, I'm going to offer them all  
23 into evidence.

24 MR. LAWRENCE: Objection, foundation as to those  
25 that predate her employment and relevance as to those that

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1 postdate September 2008.

2 THE COURT: The objection is sustained.

3 MR. GLEESON: Judge, I'll just -- excuse me. In  
4 that event, I'll offer the ACE Reports within the tenure of  
5 Ms. Crain as business records under 803(6) of the Federal  
6 Rules of Evidence.

7 THE COURT: And those would be which ones?

8 MR. GLEESON: Those would be --

9 BY MR. GLEESON:

10 Q. You began at the bank when, Ms. Crain?

11 A. June of 2007.

12 Q. Okay. And you left?

13 A. In May of 2012.

14 MR. GLEESON: Okay. So that would be, Your Honor,  
15 all the reports except for -- one, two, three, four, five,  
16 six, seven -- the first six. By now it's such a short list,  
17 I could probably just read it, if the Court wants me to.

18 THE COURT: Let me -- there's one that is  
19 February 2007, correct?

20 MR. GLEESON: Yes. I'm not offering that.

21 THE COURT: Okay. So that's more than six, then,  
22 as I count.

23 MR. GLEESON: I'm sorry, Judge. The left column.  
24 Forgive me. Why don't I just do the exhibit numbers, if  
25 that's all right with the Court, if they are received?

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1 THE COURT: Well, I want to -- is there any  
2 objection?

3 MR. LAWRENCE: Your Honor, I believe the Court  
4 sustained the objection as to the last three ACE Reports on  
5 the list that is marked DX-40496.

6 THE COURT: I have.

7 MR. GLEESON: That's contrary to my understanding,  
8 Judge. Can we approach?

9 THE COURT: You may.

10 **(At sidebar)**

11 THE COURT: So let's be clear. DX-40496, which is  
12 posed and offered right now, has three columns. The first  
13 column you're not offering, correct?

14 MR. GLEESON: I'm offering, but you have sustained  
15 the objection.

16 THE COURT: Okay. So that's gone. So now being  
17 offered are the second column as well as the third column,  
18 correct?

19 MR. GLEESON: Yes.

20 THE COURT: Okay. And the objection is as to  
21 December -- the third column, December 2008, January 2009,  
22 February 2009; is that correct?

23 MR. LAWRENCE: Correct, Your Honor.

24 THE COURT: So you wanted to be heard?

25 MR. GLEESON: Oh, yes. She was here at the bank.

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1 These are the last three -- the Petters Company accounts at  
2 M&I Bank didn't terminate on the date of his arrest. This  
3 just completes the picture and is part of the wind-down of  
4 the account at M&I Bank.

5 MR. LAWRENCE: Your Honor, after September 2008  
6 there's no relevance as to what would be the revenues or  
7 profitability for the 9018 account to the bank. And to the  
8 extent that there was any probative value, it would be  
9 outweighed by the risk of confusion to the jury.

10 MR. GLEESON: With respect, there is really no  
11 confusion to the jury. This completes the picture of the  
12 very account -- and it goes through February of 2009. It  
13 just completes the picture of the accounts that are at the  
14 heart of this case.

15 THE COURT: So the objection is sustained and  
16 December 2008, January 2009, and February 2009 are not  
17 received in evidence as to this exhibit.

18 MR. GLEESON: Okay.

19 MR. LAWRENCE: Thank you.

20 MR. GLEESON: Judge, would you prefer me, since  
21 we're -- we'll just cross those out or would you prefer me  
22 just to read into the record the exhibits that you've  
23 received?

24 THE COURT: You need to read into the record what  
25 evidence is received. And this (indicating) will not go --



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1 MR. GLEESON: Fair enough.

2 THE COURT: -- to the jury.

3 MR. GLEESON: Of course not. I didn't intend it  
4 to, Judge. I was just trying to make it easier rather than  
5 read all the --

6 THE COURT: So this is just a demonstrative  
7 exhibit --

8 MR. GLEESON: Yes.

9 THE COURT: -- that you offered for the assistance  
10 of us at sidebar and --

11 MR. GLEESON: Yes.

12 THE COURT: -- to address the relevancy and --

13 MR. GLEESON: It would never go to the jury.

14 THE COURT: -- admissibility?

15 MR. GLEESON: Correct.

16 **(In open court)**

17 MR. GLEESON: Okay. Thank you, Judge. I'll read  
18 into the -- in light of your rulings at sidebar, with the  
19 Court's permission, I'll read into the record the exhibit  
20 numbers of the ACE Reports that have been received in  
21 evidence. Do I have your permission to do that?

22 THE COURT: You may.

23 MR. GLEESON: They are -- and, Judge, is it all  
24 right if I just mention the months as well that have been  
25 received?

Crain - Direct

1 THE COURT: So you're planning to read off of this  
2 chart that I'm looking at and it would be August 2007 and  
3 then the number; is that what you are asking?

4 MR. GLEESON: Correct.

5 THE COURT: Yes.

6 MR. GLEESON: Thank you, Judge. August 2007,  
7 Defendant's Exhibit 40231; December 2007, Defendant's  
8 Exhibit 40238; January 2008, Defendant's Exhibit 40269;  
9 March 2008, Defendant's Exhibit 40283; May 2008, Defendant's  
10 Exhibit 40306; June 2008, Defendant's Exhibit 40308;  
11 July 2008, Defendant's Exhibit 40330; September 2008,  
12 Defendant's Exhibit 40350; December -- no.

13 THE COURT: Counsel?

14 MR. GLEESON: Excuse me. Sorry.

15 THE COURT: That is the conclusion of the list.

16 MR. GLEESON: Yes, September 2008 is the last one.  
17 Forgive me, Judge. Thank you, Your Honor. May I continue?

18 THE COURT: You may.

19 BY MR. GLEESON:

20 Q. Can I show you what's in evidence now as 40308,  
21 Ms. Crain. It will come up on the screen in a moment.

22 MR. GLEESON: And if you could go, Mr. Herzka --  
23 there you go. Maybe you could help us out at the top to  
24 make it a little more readable, please.

25 BY MR. GLEESON:

Crain - Direct

1 Q. And do what's easiest for you, Ms. Crain. You have a  
2 written version there. This looks pretty readable, but it's  
3 your call whether you want to go through the -- look at the  
4 written version or what's on your screen. Okay?

5 A. Okay.

6 Q. And if you need time to get to the written version,  
7 please just tell us.

8 As with the ACE Reports for the particular  
9 bankers, are these arranged in order of profitability?

10 A. Yes, they are.

11 Q. Okay. And this at the top says, "ACE Profitability  
12 Ranking Report, Relationship Banking by Region." Correct?

13 A. Yes, that's correct.

14 Q. And remind me what the -- the jury, please, what this  
15 covered. What's the region?

16 A. This is for the Minnesota region and it is for the  
17 business banking group.

18 Q. Are there separate ACE Reports for the commercial  
19 banking group?

20 A. Yes, there were.

21 Q. And the other groups within the bank?

22 A. Yes.

23 Q. And this looks like a similar format. Along the top it  
24 says, "Net Profit" and includes the last rolling 12 months  
25 before the report and the current month, correct?

Crain - Direct

1 A. That is correct.

2 Q. Okay. And this report is from what date -- from what  
3 month?

4 A. This is from June of 2008.

5 Q. Okay. And at the top, the most profitable customer is  
6 which one?

7 A. The company is [REDACTED], Inc.

8 Q. Okay. And the profit there is what? Can you read that  
9 all right?

10 A. Yes. It's \$537,316.

11 Q. Over the last 12 months from [REDACTED], correct?

12 A. Yes.

13 Q. And is there a place on this regional ACE Report that  
14 shows the relationship banker for the particular entries on  
15 the report?

16 A. Yes. It's on the far right column, if I recall. Yes.

17 Q. Okay. So at the top of the list is Sara Ausman. Was  
18 she the relationship banker for [REDACTED] at that time?

19 A. Yes, she was.

20 Q. And, Mr. Flynn --

21 MR. GLEESON: If we go down that side of the  
22 column on the right side, Mr. Herzka. Sorry. Forgive me.

23 BY MR. GLEESON:

24 Q. His -- the first time he appears is, looks like, on the  
25 sixth most profitable customer; is that correct?

Chain - Direct

1 A. Yes, that's correct.

2 MR. GLEESON: And can we go back over. There we  
3 go.

4 BY MR. GLEESON:

5 Q. That customer of Mr. Flynn's was?

6 A. [REDACTED]

7 Q. Okay. And does Petters appear on this regional report,  
8 this profitability report?

9 A. Yes. I believe it's on the lower part of this report.

10 Q. Can we --

11 A. Yes.

12 Q. So it's down there. And its profitable over the  
13 previous 12 months prior to this report was what?

14 A. \$81,254.

15 Q. Okay.

16 MR. GLEESON: And maybe you can -- I'm not going  
17 to ask you to count it, but can you enlarge the -- sorry.  
18 Can you scale down the -- there you go.

19 BY MR. GLEESON:

20 Q. So it looks -- it's down there at the bottom, correct?

21 A. Yes.

22 Q. Okay. Are there other customers of Mr. Flynn's that are  
23 more profitable on this chart?

24 A. Yes. The other one of his noted was [REDACTED], the sixth  
25 one down.

Crain - Direct

1 Q. There's [REDACTED].

2 MR. GLEESON: And then could you focus on the  
3 column on the right, please, Mr. Herzka.

4 BY MR. GLEESON:

5 Q. See a couple of others there. Looks like one, two,  
6 three, four five down another Chris Flynn account?

7 A. Oh, yes, I see that. It's like tenth down or something,  
8 yeah.

9 Q. Okay. In any event, it's in evidence, but if one wanted  
10 to see the -- how Chris Flynn's portfolio customers compared  
11 to others in the region in terms of profitability, you'd  
12 look at this regional ACE Report, correct?

13 A. Yes, that's correct.

14 Q. Okay. If you go across the top of the report, you see a  
15 column that says, "Average Loan Balance."

16 MR. GLEESON: Can you focus on that, Mr. Herzka,  
17 please. Thank you.

18 BY MR. GLEESON:

19 Q. For most of the customers on the page, there's a number  
20 there, correct?

21 A. Yes, that's the case.

22 Q. Okay. But for PCI there's none, correct?

23 A. Yes, that's correct.

24 Q. What does that mean?

25 A. That we had no loans with PCI.

Crain - Direct

1 Q. Okay. And if there were a loan, the profitability or  
2 lack thereof from that loan would be right there on the  
3 chart, correct?

4 A. Yes, it would be reflected on this report.

5 Q. Okay. What's more profitable, Ms. Crain, for a bank, a  
6 loan relationship -- as a general matter -- a loan  
7 relationship or a deposit relationship?

8 A. Generally, a loan relationship.

9 Q. Okay. Is it meaningfully more profitable than a deposit  
10 relationship as a general rule?

11 A. Loans are our biggest driver of revenue -- generally are  
12 the bigger driver of revenue, yes.

13 Q. Why is that, briefly, for the benefit of the jury?

14 A. It's just simply a pricing factor. You -- it's the  
15 amount you charge to lend money to someone and that's funded  
16 by a deposit that is priced differently. It's of less cost.  
17 And it's the margin between the two in which the bank  
18 largely makes its money.

19 Q. Okay. Do you recall any efforts on Chris Flynn's part  
20 to establish a loan relationship with PCI?

21 A. I do remember Chris having a conversation with  
22 individuals at Petters who were interested in pursuing some  
23 opportunities for credit, yes.

24 Q. Okay.

25 MR. GLEESON: Mr. Herzka, could you please pull up

Crain - Direct

1 Plaintiff's 26, which is already in evidence. Maybe you can  
2 pull out just a little bit, please. There we go.

3 BY MR. GLEESON:

4 Q. Ms. Crain, do you recognize this?

5 A. Yes, I do.

6 Q. Have you had a chance to look at this before you came to  
7 court?

8 A. I did.

9 Q. It's an e-mail chain between you and Chris Flynn about  
10 PCI?

11 A. That's correct.

12 Q. Okay. And it occurs on what dates? That one there  
13 before you is September 14th, correct?

14 A. Yes, 2007.

15 Q. Okay. And if you scroll down, you'll see there's an  
16 attachment to this e-mail.

17 MR. GLEESON: Thank you, Mr. Herzka.

18 BY MR. GLEESON:

19 Q. And recognize that, recognize what form that is?

20 A. Yes. It's part of our customer relationship management  
21 form. It was called a MIContacts form.

22 Q. Okay. Did you see a lot of those in the course of your  
23 duties at M&I Bank?

24 A. Yes. It was how we recorded information in terms of  
25 connections with our customers.



Chris - Direct

1 Q. Okay. And the date on this report is?

2 A. September 13th, 2007.

3 Q. Okay. And the -- next to "Summary," it says what?

4 A. It says, "Introducing after Ed's Departure."

5 Q. Okay. And what do you understand that to mean?

6 A. Chris made a call on the customer to introduce himself  
7 as the relationship manager given that their banker had just  
8 departed M&I.

9 Q. And "their banker" being Edward Jambor, correct?

10 A. That's correct.

11 Q. Was it typical when one business banker left for another  
12 business banker who took over that customer to do an  
13 introductory visit?

14 A. Very much so.

15 Q. Okay. And what was the purpose or purposes of those  
16 visits?

17 A. To make sure the customer knew who their new contact was  
18 to help manage their relationship at the bank.

19 Q. Is it important for the succeeding relationship banker  
20 to visit customers in circumstances like that?

21 A. Very much so, yes.

22 Q. And this says that Chris met with Mark Laumann, Jim  
23 Wehmhoff, and Tom Salmen. Did you know those folks, those  
24 men?

25 A. I did not, no.

Crain - Direct

1 Q. Okay. You ever met them?

2 A. No.

3 Q. Okay. Do you understand that they worked at PCI from  
4 the context of this MIContact?

5 A. Yes. Yes.

6 MR. LAWRENCE: Objection, foundation.

7 THE COURT: Overruled.

8 BY MR. GLEESON:

9 Q. And we don't need to read this whole thing, but you have  
10 seen it before you came to court, you said. Can you tell us  
11 generally what's on here, Ms. Crain, what's on this  
12 communication that was forwarded to you by Chris Flynn.

13 A. Yes. Chris had gone out to the customer to introduce  
14 himself as the new banker. And in the course of talking  
15 with the individuals he was meeting with, they shared with  
16 him some other interests they had in working with M&I,  
17 largely with regard to some commercial real estate  
18 opportunities, to extend some loans, and then there was an  
19 opportunity for Mr. Petters himself as well.

20 Q. And these are -- you understood these to be potential  
21 opportunities for the bank mentioned during this  
22 introductory meeting by -- between Chris and the folks at  
23 PCI, correct?

24 A. That's correct.

25 Q. Okay. And if you scroll up to the text of the e-mail

Cfain - Direct

1 from Chris to you, it says, "Some large dollar  
2 opportunities, can't assess their quality yet, but will be  
3 setting up intro meeting for CRE." Do you see that?

4 A. I do.

5 Q. What's "CRE"?

6 A. Commercial real estate.

7 Q. Okay. Is that yet another division within M&I Bank at  
8 the time?

9 A. Yes, it was.

10 Q. Okay. And what -- I bet they were involved in  
11 commercial real estate; is that correct?

12 A. Yes.

13 Q. Okay. Was Mr. Flynn asking you to do anything at this  
14 point?

15 A. No. He was just informing me of the call.

16 Q. Okay. Kind of a heads-up of the possible opportunities?

17 A. That's correct.

18 Q. Was that common for a team lead under your supervision,  
19 to do that for you?

20 A. Yeah. I think it was particularly important here  
21 because he would have been referring a business opportunity  
22 to another division in the bank, someone -- one of my peers  
23 in the commercial real estate group.

24 Q. Would you have been involved in that -- in the referral  
25 to the other group?

Chris - Direct

1 A. Chris would have largely managed that.

2 Q. And to your knowledge, did any of the prospects set  
3 forth on the MIContact report that Chris Flynn forwarded to  
4 you come to fruition?

5 A. Not to my knowledge.

6 Q. If they had gone through, would they have been  
7 opportunities for Mr. Flynn or for the commercial real  
8 estate department?

9 A. The nature of what the customer was asking for was  
10 largely something that would have been handled by our  
11 commercial real estate group. It wasn't an owner-occupied  
12 loan. It was something more of a development nature.

13 Q. Okay. And had those opportunities come to pass, had  
14 they come to fruition, would M&I Bank need -- would it have  
15 needed more financial information from PCI?

16 A. Yes. That's how we would have assessed the quality to  
17 make the loan.

18 Q. Okay. Did you have financial information for PCI at the  
19 time?

20 A. No, we did not.

21 Q. Okay. How do you know that?

22 A. We didn't have any loan -- loans with them. It was a  
23 deposit opportunity only at that point.

24 Q. Okay. And was it typical not to have financial  
25 information when the only relationship with a customer was a

Crain - Direct

1 deposit relationship?

2 A. Yes, that would be typical.

3 Q. Okay. Was it typical for opportunities like the ones  
4 Chris described to you not to come to fruition?

5 A. Yes. I mean, it was -- he was prospecting. The  
6 customer was sharing what they were looking for. But that  
7 didn't mean that it would actually happen.

8 Q. Okay. And is this sort of -- looking for these kind of  
9 opportunities part of a business banker's obligation to the  
10 bank?

11 A. Yes.

12 Q. Okay. Are you familiar with the phrase "know your  
13 customer" in the banking industry?

14 A. Yes, I am.

15 Q. Okay. What do you understand that to mean, Ms. Crain?

16 A. Largely it's a regulatory, you know, issue for us and  
17 it's to make sure you know who you are doing business with  
18 so that you can identify individuals that you are working  
19 with, so those who are signing accounts to conduct business  
20 with the bank, and understanding generally the nature of  
21 someone's business.

22 Q. Yes. And I think you began to answer it, but could you  
23 tell the jury, kind of at a high level, what level of detail  
24 does a banker need to know about a customer's business?

25 MR. LAWRENCE: Objection, improper opinion

Craig - Direct

1 testimony.

2 THE COURT: Sustained.

3 BY MR. GLEESON:

4 Q. You're in the business for 40 years, correct?

5 A. Correct.

6 Q. Okay. And "know your customer" has been an element of  
7 banking for all or at least substantially all of those  
8 40 years, correct?

9 A. Yes.

10 Q. Okay. Do you -- when you became a banker, were you  
11 instructed as to what it meant to know your customer?

12 A. Yes.

13 Q. Okay. And did you put that into practice during your  
14 work as a business banker and in other forms of banking over  
15 the years?

16 A. Yes.

17 Q. Do you provide guidance to bankers now that are under  
18 your supervision about what it means to know your customer?

19 A. Yes. We all have a good understanding how important  
20 that is in our business, yes.

21 Q. Okay. You have a -- do you feel you have a good --  
22 based on your experience, an understanding as to what level  
23 of detail you need to have about your customers' business?

24 A. It depends --

25 MR. LAWRENCE: Objection, improper and undisclosed

Craig - Direct

1 opinion testimony.

2 THE COURT: Overruled.

3 THE WITNESS: It depends to what the nature of the  
4 business is with the customer. For a depository account  
5 it's important to identify who the person is and know that  
6 they can sign a signature card, for instance. When -- it  
7 depends. If you have a loan with someone, then you are  
8 going much deeper into the information you would receive.

9 BY MR. GLEESON:

10 Q. Okay. If you had a customer with just a deposit  
11 relationship and it's a restaurant, would you expect a  
12 banker under your supervision to know the names of the  
13 restaurant's suppliers?

14 MR. LAWRENCE: Objection, improper hypothetical  
15 and opinion testimony.

16 THE COURT: Sustained.

17 BY MR. GLEESON:

18 Q. The -- would you expect Mr. Flynn -- who was under your  
19 supervision, correct?

20 A. Yes, he was.

21 Q. -- would you expect -- do you know what the term  
22 "counterparties" means?

23 A. Yes. I mean --

24 Q. And in the context -- let's take PCI. "Counterparties"  
25 would mean the persons or entities with which PCI was doing

Chain - Direct

1 business, correct?

2 A. Correct.

3 Q. Okay. When you were supervising Chris Flynn, did you  
4 expect him to know who the counterparties were with PCI?

5 A. No, I would not expect that to be something that he  
6 would typically have, no.

7 Q. Would you expect him to know -- as part of his "know  
8 your customer" responsibilities, would you expect him to  
9 know who PCI was transacting business with?

10 A. No.

11 MR. LAWRENCE: Objection, improper opinion.

12 THE COURT: Sustained.

13 BY MR. GLEESON:

14 Q. Did you ever hear -- back when you were working at M&I  
15 Bank, did you ever hear of the entities Nationwide or  
16 Enchanted?

17 A. No.

18 Q. Okay. If they were doing business with PCI, would you  
19 have expected Mr. Flynn to know who they were?

20 MR. LAWRENCE: Objection, speculation,  
21 hypothetical.

22 THE COURT: Sustained.

23 MR. GLEESON: Can I come up, please, Judge? May I  
24 approach the bench? Withdrawn.

25 THE COURT: I've ruled on the objection.



Craig - Direct

1 MR. GLEESON: I understand that. I have withdrawn  
2 my application to approach the sidebar. Thank you,  
3 Your Honor.

4 THE COURT: You're welcome. Thank you.

5 BY MR. GLEESON:

6 Q. If a business banker under your supervision has a  
7 customer with just a deposit relationship, would you expect  
8 that business banker to generate loan relationships with  
9 that customer?

10 A. It would be part of the opportunity, yes.

11 Q. And would you have expected Chris Flynn to know whether  
12 PCI had loans with other entities?

13 MR. LAWRENCE: Objection, calls for speculation,  
14 foundation.

15 THE COURT: Sustained.

16 BY MR. GLEESON:

17 Q. Would you have expected him to know the average deposit  
18 balance of his customers?

19 MR. LAWRENCE: Objection; same objection.

20 THE COURT: Sustained.

21 BY MR. GLEESON:

22 Q. You're a business banker for a long time, correct, and a  
23 commercial banker?

24 A. Yes.

25 Q. When you had deposit relationships -- withdrawn.

Crain - Direct

1 From time to time you yourself handled -- were the  
2 relationship manager for customers of banks, correct?

3 A. Correct.

4 Q. And when that happened and you had deposit  
5 relationships, did you care about the average deposit  
6 balance in your customers' accounts?

7 A. Yes, I did.

8 MR. LAWRENCE: Objection, relevance.

9 BY MR. GLEESON:

10 Q. Why?

11 THE COURT: Overruled.

12 BY MR. GLEESON:

13 Q. Why?

14 THE COURT: You may answer.

15 THE WITNESS: Yes, I did. Why?

16 BY MR. GLEESON:

17 Q. Yes.

18 A. It was important to understand potentially what other  
19 services and products we could offer -- I could offer to  
20 someone based on those balances. They might have had needs  
21 for some of our treasury management services, investment  
22 services, and it was just overall a part of how you would  
23 manage a relationship.

24 Q. And was the average deposit balance the key to the  
25 profitability of a deposit account?

Crain - Direct

1 A. Yes.

2 Q. Okay. Were the deposits into and withdrawals from that  
3 account a matter of concern to you when you managed a  
4 deposit relationship?

5 A. That would not be typically something that I would have  
6 looked at with any frequency, no.

7 Q. You wouldn't pay attention to that in the regular  
8 course?

9 A. I wouldn't have had the information to look at that, no.

10 Q. Okay. And when you were managing such relationships,  
11 did you pay attention to who the suppliers were of your  
12 customer?

13 MR. LAWRENCE: Objection, hypothetical, relevance.

14 THE COURT: Sustained.

15 BY MR. GLEESON:

16 Q. While you were supervising Mr. Flynn, did you -- did the  
17 bank enter into any -- withdrawn.

18 Do you know what the phrase "Deposit Account  
19 Agreements" -- you ever hear that phrase?

20 A. Yes.

21 Q. Okay. What does that mean to you?

22 A. It's a specific agreement to help govern how a deposit  
23 account would be managed.

24 Q. Okay. While you were supervising Chris Flynn, did PCI  
25 ask the bank to enter into any Deposit Account Agreements?

Crain - Direct

1 A. Yes, they did.

2 Q. Okay. And are Deposit Account Agreements common?

3 A. No, they are not common.

4 Q. Okay. Are they unheard of?

5 A. Not unheard of, but not very common.

6 Q. Okay. And are you familiar with trust accounts,  
7 Ms. Crain?

8 A. Yes, I am.

9 Q. Okay. What's a trust account?

10 A. Largely it's an account that you would hold -- be more  
11 custodial, to hold funds, funds on behalf of a customer for  
12 investments and/or for escrow purposes, a variety of  
13 purposes.

14 Q. So a trust account is like a separate account, correct?

15 A. Yes.

16 Q. And is there a beneficiary to a trust account?

17 A. Yes.

18 Q. Okay.

19 A. Typically, yes.

20 Q. And are deposit accounts analogous in any way to trust  
21 accounts?

22 A. They are both accounts that hold funds, and it depends  
23 on who is the beneficiary of those accounts, yes.

24 Q. Are trust accounts common?

25 A. Yes.

Crain - Direct

1 Q. Okay. Was working -- back to PCI. Was working with PCI  
2 in order -- in relation to Deposit Account Agreements a  
3 service to the bank's client?

4 A. Yes, it was.

5 Q. And did you work with Chris in connection with Deposit  
6 Account Agreements, Chris Flynn?

7 A. Yes, I did.

8 Q. And do you recall when this was?

9 A. I believe it was in -- I'd have to look back at some of  
10 the documents, but in the 2007, 2008 time frame.

11 Q. All right. Let me ask you -- you have a book before  
12 you, and there's a communication not yet in evidence, P-72.  
13 Do you have that before you, Ms. Crain?

14 A. Yes, I do.

15 Q. Just generally, what is that?

16 A. This is an e-mail that was sent to me by Carolyn Moline.

17 Q. Okay. And the date?

18 A. February 20th, 2008.

19 Q. Okay. Does any part of that e-mail pertain to the  
20 Deposit Account Agreement you worked with Chris Flynn with  
21 regard to?

22 A. Yes. It's the very last paragraph of this e-mail.

23 Q. Okay. First two look like they relate to an unrelated  
24 personnel matter?

25 A. Yes, that's correct.

Crain - Direct

1 Q. Okay.

2 MR. GLEESON: I offer P-72 in evidence.

3 MR. LAWRENCE: No objection.

4 THE COURT: The exhibit is received, P-72.

5 BY MR. GLEESON:

6 Q. Okay. There's the e-mail. You mentioned those first  
7 two paragraphs relate to something entirely unrelated, so  
8 let's focus on the third.

9 And before I ask you questions about this, tell us  
10 a little bit about who Carolyn Moline is and what her role  
11 was at the time.

12 A. Carolyn Moline was a banking assistant supporting  
13 bankers in managing customer relationships.

14 Q. Okay. And did you and the bankers under your  
15 supervision work with her?

16 A. Yes, we did.

17 Q. She helped administer things at the bank?

18 A. Yes.

19 Q. Okay. And she says to you, "One more thing, I had  
20 mentioned this control agreement and Chris is kind of moving  
21 forward in this process. He mentioned he wanted to bring  
22 you into the loop." Let's stop there.

23 Did Mr. Flynn actually bring you into the loop  
24 with regard to this Control Agreement she's referring to?

25 A. Yes, he did.

Crain - Direct

1 Q. Okay. The next sentence says, "Kevin Busch" -- who's  
2 Kevin Busch?

3 A. Kevin Busch is an attorney.

4 Q. Okay. And who did he represent?

5 A. M&I Bank.

6 Q. Okay. Was he working in the bank or was he outside  
7 counsel for the bank?

8 A. Outside counsel.

9 Q. So "Kevin Busch," and then there's a redaction, "worked  
10 with the other parties [sic] attorney to get something to  
11 agree on." We'll stop there.

12 Do you know who brought Kevin Busch into these  
13 events?

14 A. I believe it was Chris Flynn.

15 Q. Okay. And it goes on to say, "We did a conference call  
16 today to try to get a handle on activity and pricing." Do  
17 you see that?

18 A. I do.

19 Q. What did you understand Ms. Moline to be referring to  
20 when she said "activity and pricing"?

21 A. We had been -- the customer had requested this  
22 particular arrangement for a deposit account, a Control  
23 Agreement to go with it. We wanted to understand the kind  
24 of volume activity and how to price it accordingly.

25 Q. Okay. How do -- when you say "how to price it," what do

Craig - Direct

1 you mean by that?

2 A. Well, we wanted to make sure that what we were -- what  
3 we were doing in terms of taking care of the customer and  
4 providing this service is that we would be compensated  
5 accordingly.

6 Q. Okay. And she goes on to say, "They mentioned U.S. Bank  
7 charges them a flat rate of \$5,000 annually."

8 As you understood it, who was charging -- who was  
9 U.S. Bank charging \$5,000 to?

10 A. My understanding of this is they were charging PCI for  
11 the same kind of arrangement, a \$5,000 fee to do what they  
12 were asking us to do.

13 Q. A fee for a -- for the administration of a Deposit  
14 Account Agreement?

15 A. Correct.

16 Q. Okay. And as you understood it, pulling away from the  
17 e-mail just for a moment, did you understand the deposit  
18 account at issue here would be a source of income for the  
19 bank?

20 A. Yes. We were looking for the opportunity to do more  
21 business with the organization and having, you know, a new  
22 depository account would provide the additional opportunity  
23 for income.

24 Q. I see. You were looking for the potential for more  
25 income?



Crain - Direct

1 A. Yes.

2 Q. Okay. Did you understand that the deposit account  
3 itself, if one were created, that the deposit account itself  
4 would be a profit-making endeavor for the bank?

5 A. The -- an actual account at the bank, yes.

6 Q. Okay. And the -- going down, Carolyn says to you, "So I  
7 don't know who will pick up the tab for the attorney fee."

8 That's the attorney fee in connection with  
9 creating the account?

10 A. Creating the agreement, yes.

11 Q. The agreement, okay.

12 "But I do have some reservations on the amount of  
13 work this will be and the benefit to the bank. Chris feels  
14 there's potential for more business from Petters." You see  
15 that?

16 A. Yes.

17 Q. Is that what you are referring to when it was -- this  
18 might be profitable to the bank because of additional  
19 business?

20 A. Correct.

21 Q. Okay. How did you -- did you understand Carolyn to have  
22 a concern about this Deposit Account Agreement at this point  
23 in time?

24 A. I wouldn't characterize it as concern. She was -- just  
25 wanted to make sure that she understood what it would take

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1 in terms of managing the account, what would be required,  
2 the amount of work that it would take, and that we -- the  
3 bank was being compensated appropriately as a result.

4 Q. And was Carolyn part of the bank that would actually  
5 implement the deposit agreement if the -- a deposit account  
6 if an agreement were reached?

7 A. Yes.

8 Q. Let me ask you -- let me invite your attention, please,  
9 to Defendant's Exhibit 40208 in the book before you.

10 A. 40248?

11 Q. I'm being corrected. Bear with me for one second.

12 (Pause)

13 Q. Defendant's Exhibit 40248, do you have that in front of  
14 you?

15 A. I do have that, yes.

16 Q. What is that?

17 A. This is an e-mail exchange between Carolyn Moline and  
18 myself.

19 Q. Okay. And is this on the same topic? Does this relate  
20 to the same topic we've just been -- you've been testifying  
21 about?

22 A. Yes, it is.

23 Q. Okay. Also a little bit related to the separate  
24 personnel topic, correct?

25 A. Correct.

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1 Q. Okay.

2 MR. GLEESON: I offer it in evidence.

3 MR. LAWRENCE: No objection.

4 THE COURT: Exhibit 40248 is received, Defendant's  
5 Exhibit.

6 BY MR. GLEESON:

7 Q. You have it in front of you?

8 A. I do.

9 Q. Okay. The date of this is what, Ms. Crain? Do you see  
10 it, the date of the --

11 A. Yes, on February 20th, 2008.

12 Q. And Carolyn Moline states to you --

13 MR. GLEESON: And let's find it. It's bottom of  
14 the first page, Mr. Herzka.

15 BY MR. GLEESON:

16 Q. She writes, "Also, regarding this Control with the  
17 entity involved with Petters - they mentioned they may run  
18 through 800 Million per quarter. Although, it sounds like  
19 there will not be a significant amount that stays here." Do  
20 you see that?

21 A. I do.

22 Q. Okay. What did you understand Carolyn to mean when she  
23 said "they may run through 8 [sic] million per quarter"?

24 Back up. Withdrawn.

25 "Regarding this Control" pertains to what? What

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1 did you understand her to be referring to?

2 A. She was talking about the Control Agreement that they  
3 were asked to be put in place for a new depository  
4 relationship.

5 Q. Okay. And do you recall now the entity that was  
6 involved with Petters that she refers to here?

7 A. Yes. For -- in February, this was for Palm Beach, I  
8 believe.

9 Q. Okay.

10 A. Yeah.

11 Q. "They mentioned they may run through 8 [sic] million per  
12 quarter. Although, it sounds like there will not be a  
13 significant amount that stays here."

14 What did you understand her to mean when she told  
15 you that?

16 A. She was just sharing with me that there was not going to  
17 be a significant deposit balance, but a fair amount of  
18 transactions.

19 Q. So the deposit balance would mean the money that stayed  
20 in the account, correct?

21 A. Correct.

22 Q. And Ms. Moline was telling you that there would be a lot  
23 of money running through the account, but it wouldn't be  
24 staying there, correct?

25 A. Correct.

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1 Q. Okay. And would that affect the profitability of the  
2 account set up by this agreement if the agreement were  
3 executed?

4 A. Yes. I mean, largely, again, the bank makes money by  
5 having a higher average deposit than not.

6 Q. Okay. Carolyn goes on -- or Ms. Moline, excuse me, goes  
7 on to say, "I told Chris today I thought he should mention  
8 to Hank to see how this would affect the bank's books and he  
9 thought it would be a good idea." Do you see that?

10 A. I do.

11 Q. Who is Hank?

12 A. Hank Donatell was the regional controller for the  
13 Minnesota region for M&I Bank.

14 Q. And is Carolyn saying to you that Hank agreed it would  
15 be a good idea -- excuse me, that Chris agreed it would be a  
16 good idea to talk to Mr. Donatell?

17 A. Yes.

18 Q. Okay. And it goes on to say, "We conferenced in" --  
19 well, first she says, "He mentioned he had e-mailed you  
20 regarding some of this." Do you see that?

21 A. I do.

22 Q. That's a reference to whom?

23 A. Chris.

24 Q. e-mailing you?

25 A. Yes.

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1 Q. Did Chris keep you in the loop during this entire series  
2 of events?

3 A. Yes, he did.

4 Q. And then it says, "We conferenced in Dave Preiner who is  
5 in the trust department. He could do more if there were  
6 monies that needed to be invested, but we'll keep him in the  
7 loop." Do you see that?

8 A. Yes.

9 Q. The reference to Dave Preiner in the trust department,  
10 what did you understand Carolyn to be telling you that for?

11 A. We were -- I think both Chris and Carolyn were  
12 anticipating that if there were substantial funds in the  
13 account, Dave was someone in our trust department, that he  
14 would be a resource they could introduce to the customer to  
15 help invest those dollars. Dave was a salesperson within  
16 the trust department.

17 Q. And when it says, "He could do more if there were monies  
18 that needed to be invested," was Carolyn suggesting to you  
19 that since the money is not staying in the account, Dave  
20 Preiner can't help much?

21 MR. LAWRENCE: Objection, leading.

22 THE COURT: Sustained.

23 MR. GLEESON: Okay.

24 BY MR. GLEESON:

25 Q. Why could Dave Preiner do more if monies were needed to

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1 be invested?

2 A. He had alternative options for making those investments  
3 by virtue of the part of the organization he worked within.

4 Q. If money had stayed in the account, would the trust  
5 department's abilities affect the profitability of the  
6 account?

7 A. Yes. That would have been a cross-sell opportunity.

8 Q. Let me invite your attention to Defendant's  
9 Exhibit 40252, please. What is this?

10 A. This is an e-mail exchange. It starts off with -- the  
11 very first part of this exchange is from Kevin Busch to  
12 Jamie Anderson, with Chris Flynn copied.

13 Q. Okay. And this, again, pertains to the Deposit Account  
14 Agreement that you have been testifying about?

15 A. Yes, it does.

16 Q. Okay. And the date is?

17 A. February 21st, 2008.

18 Q. Okay.

19 MR. GLEESON: I offer it in evidence.

20 MR. LAWRENCE: No objection.

21 THE COURT: The exhibit is received.

22 BY MR. GLEESON:

23 Q. So this is the very next day, correct?

24 A. That is correct.

25 Q. And in this e-mail from Chris Flynn to you --

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1 MR. GLEESON: At the top, Mr. Herzka, if you could  
2 focus in on that. Thank you, sir.

3 BY MR. GLEESON:

4 Q. "Per my previous e-mail. This account will have nominal  
5 balances as funds transferred in from Petters will be wired  
6 out by Palm Beach Capital the same day." Do you see that?

7 A. Yes.

8 Q. Okay. When he said "nominal balances," what did you  
9 understand him to be referring to?

10 A. That the account would not have a significant average  
11 balance.

12 Q. So what Chris Flynn was telling you in February of 2008,  
13 this account itself wasn't going to be a moneymaker for the  
14 bank, correct?

15 A. That's correct.

16 Q. But he had informed you -- withdrawn.

17 But this was a good reason for the bank -- a good  
18 thing for the bank to consider why if it wasn't going to be  
19 profitable?

20 A. There were other opportunities that the customer had  
21 informed us that they were interested in working with us on.  
22 This was -- and this was something they had asked us to do  
23 for them.

24 Q. So this was a customer service?

25 A. Yes. This was an accommodation to this customer for



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1 this particular need that they were requesting.

2 Q. Okay. It goes on to say -- Mr. Flynn's e-mail to you  
3 goes on to say, "I have engaged Kevin Busch at Moss &  
4 Barnett to help structure these agreements to protect the  
5 bank."

6 What do they mean by protecting the bank, as far  
7 as you understood?

8 A. Well, if there were various requests by the customer in  
9 terms of how the account was to be managed, we wanted to  
10 make sure that we were abiding by any provisions that were  
11 established and that they were done in a way that the bank  
12 wouldn't be held liable or have any -- you know, have any  
13 liability as a result.

14 Q. Okay. And he says, "We can discuss tomorrow." Right?

15 A. Yes.

16 Q. Was this a continuing discussion among you and Kevin and  
17 Carolyn Moline and others?

18 A. Yes.

19 Q. If you could turn in your book to Defendant's 40248,  
20 please, Ms. Crain. Are you there?

21 A. I am.

22 Q. What is that?

23 A. 40248, correct?

24 Q. Okay. It's a -- but what is it? It's an e-mail?

25 A. It's an e-mail, yes. It's the one we were just talking

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1 about.

2 Q. Oh, I'm sorry. Let me --

3 MR. GLEESON: Judge, can I have just one moment to  
4 consult?

5 THE COURT: You may.

6 (Defendant's counsel confer)

7 MR. GLEESON: Thank you, Judge. I had a little  
8 exhibit confusion.

9 THE COURT: You're welcome.

10 MR. GLEESON: If we can pull up Defendant's  
11 Exhibits -- don't pull them up, Mr. Herzka.

12 BY MR. GLEESON:

13 Q. If you could turn your attention, Ms. Crain, to  
14 Exhibits 40250 and 40251.

15 A. Okay.

16 Q. Okay. Got them both?

17 A. I have both of them, yes.

18 Q. You recognize those documents?

19 A. Yes, I do.

20 Q. Okay. Briefly, could you say what they are.

21 A. Yes. One is a Release and Indemnification Agreement  
22 between M&I Bank and the beneficiary of the new account.

23 And then the other is the Deposit Account Management  
24 Agreement between M&I and the Petters Company.

25 Q. Okay. And are these the executed agreements?

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1 A. These are draft agreements.

2 Q. And were these forwarded to you in connection with your  
3 discussions about the deposit agreement that we've been  
4 discussing?

5 A. Yes.

6 MR. GLEESON: Okay. I offer them in evidence.

7 MR. LAWRENCE: The objection is to foundation. I  
8 may need to be heard briefly, Your Honor.

9 THE COURT: I didn't hear the last part of what  
10 you said. I heard you say the objection is to foundation.

11 MR. LAWRENCE: Is to foundation. And may I  
12 briefly approach?

13 THE COURT: Yes, you may.

14 Members of the Jury, you may stand and stretch  
15 during this sidebar.

16 **(At sidebar)**

17 MR. LAWRENCE: So, Your Honor, it appears that  
18 Exhibits DX-40250 and 40251, which are what are being  
19 offered into evidence right now, are the attachments to a  
20 document that's Bates marked DX-40249 and that is not a  
21 document that Ms. Crain is a recipient of. So I don't  
22 believe that the bank has laid foundation that these are the  
23 actual documents that she just testified that she's seen  
24 before.

25 MR. GLEESON: She just testified that she

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1 recognizes them as the documents -- as the drafts that she  
2 discussed with her colleagues. I can -- so that's the  
3 foundation. She recognizes the documents.

4 MR. LAWRENCE: I don't think he's established that  
5 these are the actual documents that -- he asked her if these  
6 were sent to her, and she said yes and that they were drafts  
7 that were sent to her. But I don't believe that the bank  
8 has established that these were actually the ones that were  
9 shown to her.

10 THE COURT: What more needs to be --

11 MR. LAWRENCE: To lay proper foundation, I believe  
12 the bank would need to introduce the e-mail in which these  
13 were actually shared with Ms. Crain or establish the manner  
14 in which she saw these documents.

15 THE COURT: So you can lay more foundation to  
16 establish how she understands those documents to be the ones  
17 that she understands them to be.

18 MR. GLEESON: Okay.

19 THE COURT: So the objection is sustained with the  
20 expectation of additional proper foundation being laid.

21 MR. GLEESON: Thank you.

22 **(In open court)**

23 BY MR. GLEESON:

24 Q. These drafts that you have before you, do you recall  
25 these documents being the ones that you were discussing with

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1 Chris Flynn in connection with the Palm Beach Deposit  
2 Account Agreement?

3 A. Yes.

4 MR. GLEESON: Judge, I offer them in evidence.

5 MR. LAWRENCE: No objection.

6 THE COURT: They are received.

7 BY MR. GLEESON:

8 Q. Okay. They are both up on the screen. And let me --  
9 there's two separate agreements, correct?

10 A. Yes.

11 Q. Okay. The one on the left is 40250. What is that?

12 A. It's a Release and Indemnification Agreement.

13 Q. Okay. And it's a draft, correct?

14 A. Yes.

15 Q. These agreements were subsequently executed, correct?

16 A. Yes.

17 Q. Okay. The -- who is that agreement between?

18 A. That is between M&I Bank and in this case it was Palm  
19 Beach, the beneficiary of the new account being set up by  
20 the Deposit Account Control Agreement.

21 Q. So if these agreements were executed, there would be a  
22 new account, correct?

23 A. Correct.

24 Q. That would be the deposit account?

25 A. Correct.

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1 Q. It would be to the benefit of Palm Beach, correct?

2 A. Correct.

3 MR. LAWRENCE: Objection, leading, foundation.

4 THE COURT: Sustained. Counsel keep your  
5 questions direct.

6 BY MR. GLEESON:

7 Q. If the account were set up, for whose benefit would the  
8 account be?

9 A. For Palm Beach.

10 Q. Okay. And this agreement, you said, is between Palm  
11 Beach and M&I Bank, correct?

12 A. That is correct.

13 Q. Okay. What's the purpose of this agreement?

14 A. This was to make sure that the bank was held harmless,  
15 was indemnified for any work that we were doing to -- on the  
16 transaction of the new account for Palm Beach's benefit. So  
17 they were indemnifying us for any work that we were doing.

18 Q. Could you just briefly tell the jury what you mean when  
19 you say "indemnify."

20 A. They were holding us harmless. The bank would not be  
21 held liable for, you know, any -- as the provisions were  
22 laid out on the Deposit Account Control Agreement, that we  
23 were doing what the bank, you know, was supposed to do and  
24 that we would not be able to be sued by Palm Beach for  
25 something that they thought we should have done.

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1 Q. If there --

2 MR. LAWRENCE: Objection, Your Honor. I'm going  
3 to move to strike. And may I be heard?

4 THE COURT: You may.

5 **(At sidebar)**

6 MR. LAWRENCE: I'll be brief, Your Honor. The  
7 concern is that we're getting dangerously close to running  
8 afoul of the Court's instruction with respect to investor  
9 knowledge. We're now hearing about indemnification by one  
10 of the investors provided to the bank. A, I don't think  
11 that's relevant to any issue in the case; and, B, because we  
12 are now skirting the investor knowledge issue, the risk of  
13 prejudice [inaudible].

14 THE COURT REPORTER: I'm sorry. Can you say the  
15 last part again?

16 MR. LAWRENCE: I said the minimal relevance is  
17 outweighed by whatever tangential relevance the document  
18 has.

19 MR. GLEESON: Judge, this has literally nothing to  
20 do with the investor knowledge issue that plaintiff's  
21 counsel keeps raising. What it has to do is with how the  
22 bank arranged for the establishment of the Deposit Account  
23 Agreement.

24 You may recall that in the testimony of Chris  
25 Flynn, Mr. Marder suggested that Chris Flynn did this on his

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1 own, that he did not tell his superiors about it. The  
2 suggestion was he was so enamored with Tom Petters, he would  
3 do this as a favor to Petters, kind of *ultra vires*.

4 This is his supervisor. This is to establish that  
5 these Deposit Account Agreements are not the red flags that  
6 the trustee suggests that they are, that they are -- they  
7 are actually not uncommon. There was one with another bank.  
8 And that this one was implemented by the bank in exactly the  
9 right way. They consulted counsel. Chris Flynn consulted  
10 his boss. They made sure everything was covered. There was  
11 an indemnification agreement.

12 This is -- it's relevant, of course. It's a  
13 relevant response to what they depicted as the way this  
14 Deposit Account Agreement came about. And it doesn't even  
15 strike a glancing blow on the fact that the people at Palm  
16 Beach were criminals and went to prison. I'm not going  
17 anywhere near that. The Court has ruled that out. We  
18 respect the need to comply with that ruling and we will.

19 MR. LAWRENCE: Whether Palm Beach was being  
20 indemnified by the bank does not pertain to anything that  
21 we've been talking about with respect to the DACAs, whether  
22 they are normal or abnormal, whether they were red flags or  
23 not. The fact that the bank sought indemnification doesn't  
24 relate to that.

25 And there's a risk that when we start introducing



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1 evidence that the bank sought indemnity from an investor,  
2 that that suggests that there was some potential wrongdoing  
3 that the investor should be responsible for. And the  
4 jury -- the Court has ruled that the jury -- we should not  
5 be putting on evidence that's going to give the jury the  
6 suggestion that the investors are the ones that are liable  
7 here.

8 MR. GLEESON: Judge, with respect to my colleague,  
9 I think it's a non sequitur to say that because one of the  
10 indemnification agreement with both sides -- I'm about to  
11 put in, have her testify that the arrangement was PCI would  
12 set up an account for Palm Beach. There might be fights  
13 between PCI and Palm Beach about the moving of the money  
14 within the accounts. The bank just wanted indemnification  
15 from both sides. There's no suggestion here --

16 THE COURT: Why is that relevant?

17 MR. GLEESON: It's relevant because it is integral  
18 to the Deposit Account Agreement that lies at the heart of  
19 one of the causes of action and has been identified by the  
20 plaintiff's expert as a red flag and indicative of an  
21 unusual relationship. This is how the bank engaged properly  
22 in the conduct that the trustee says is indicative of its  
23 culpability.

24 MR. LAWRENCE: As to what I argued before, I think  
25 that if there's any relevance for that, which there is none,

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1       it's very minimal.

2               THE COURT:   Okay.   I'm going to overrule the  
3       objection.   Counsel, you know the parameters --

4               MR. GLEESON:   Yes.

5               THE COURT:   -- in which you have represented to  
6       the Court that you will be addressing this and the reasons,  
7       and that is why I have overruled the objection.   Let's  
8       caution all parties of the importance to comply with that  
9       line and that narrow path.

10              MR. GLEESON:   Got it.   Can I ask one question,  
11     Judge?   If you can just -- so that I don't go anywhere near  
12     it, I would just like to ask one leading question, which is:  
13     Does this mean if there were a dispute between the  
14     accountholder and PCI, that both sides would hold M&I Bank  
15     harmless?

16              And if I do that, I have -- I'll do it with an  
17     open-ended question, but I'm just trying to short-circuit to  
18     get from A to B because I know your concern.   I have no  
19     interest in getting near your concern.   I can ask one or two  
20     leading questions and avoid the concern entirely.

21              THE COURT:   It's -- do you have any objection to  
22     that?

23              MR. LAWRENCE:   I have no objection to --

24              THE COURT:   For the purpose --

25              MR. LAWRENCE:   -- the one or two leading questions

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1 in order to stay afield of the investor --

2 MR. GLEESON: Yes.

3 THE COURT: So I will rule that -- so you may.

4 MR. GLEESON: Thank you.

5 **(In open court)**

6 THE COURT: You may proceed, Counsel.

7 MR. GLEESON: Thank you.

8 BY MR. GLEESON:

9 Q. There's -- before our sidebar, Ms. Crain, you were  
10 testifying about the indemnification agreement entered  
11 into -- or this draft indemnification agreement to be  
12 entered into if the agreement -- if the transaction went  
13 forward between M&I Bank and Palm Beach, correct?

14 A. Correct.

15 Q. And skipping ahead for a second, is it also true that  
16 there's a similar indemnification provision in the Deposit  
17 Account Agreement that PCI would enter into with M&I Bank?

18 A. That's correct.

19 Q. And is it fair to say that the purpose of those dual  
20 indemnification agreements was that if there were any  
21 dispute between PCI and Palm Beach about money going into  
22 the separate account, the deposit account, both sides would  
23 hold the bank harmless for any problems with that dispute?

24 A. That's correct. That's why we had the separate release  
25 and indemnification.

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1 Q. Thank you.

2 Okay. Let's go to -- let's turn our attention to  
3 40251 and let's go to Section 2 of that, please.

4 MR. GLEESON: And, in particular, 2(b), if you can  
5 bring that up, please, Mr. Herzka.

6 BY MR. GLEESON:

7 Q. That says, "Petters shall provide to each Protected  
8 Party and M&I at least once each week (or more if necessary  
9 to enable M&I to discharge its obligations hereunder) a list  
10 of all Transactions funded by a Protected Party."

11 Let me just stop there and ask you: "Protected  
12 party" here refers to whom?

13 A. The beneficiary, in this case Palm Beach.

14 Q. Okay. "With respect to which payment may be received by  
15 M&I for deposit in the Deposit Account." And then it  
16 defines that as "Transaction List." Do you see that,  
17 Ms. Crain?

18 A. Yes.

19 Q. You mentioned the beneficiary here, the protected party,  
20 would be -- was Palm Beach, correct?

21 A. Correct.

22 Q. Okay. Does the -- this provision require Palm Beach to  
23 get the same transaction list that the bank would get?

24 A. Yes.

25 Q. Okay. And then what did you understand this provision

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1 to mean?

2 MR. LAWRENCE: Objection, calls for a legal  
3 conclusion.

4 THE COURT: Sustained.

5 BY MR. GLEESON:

6 Q. This agreement, if executed, would establish a separate  
7 account? I'm asking for your understanding.

8 A. Yes.

9 MR. LAWRENCE: Objection, leading.

10 THE COURT: Overruled. You may answer.

11 BY MR. GLEESON:

12 Q. For the benefit of what entity?

13 THE COURT: And, Counsel, please, as you have in  
14 your follow-up question, keep your questions direct.

15 MR. GLEESON: Yes. Thank you, Judge. I will.

16 THE WITNESS: The account that was to be set up  
17 for the beneficiary in this case was for Palm Beach.

18 BY MR. GLEESON:

19 Q. Okay. And if a -- if this agreement were to be  
20 executed -- withdrawn.

21 This agreement eventually was executed, correct?

22 A. Yes, it was.

23 Q. Okay. And when it was executed, it was the bank's  
24 responsibility to fulfill it, correct?

25 A. Yes.

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1 MR. LAWRENCE: Objection, leading.

2 THE COURT: Sustained.

3 BY MR. GLEESON:

4 Q. If it was executed, would the bank have a  
5 responsibility?

6 A. Yes.

7 Q. What would that responsibility be?

8 A. The bank needed to look at the provisions, and our role  
9 was to look at -- get the transaction list that was received  
10 and then move monies as it was directed by the provisions in  
11 the agreement.

12 Q. Okay. Would there be an obligation to move money in the  
13 absence of a transaction list?

14 A. No.

15 MR. LAWRENCE: Objection, calls for a legal  
16 conclusion.

17 THE COURT: I didn't even hear what you said.  
18 Please speak up.

19 MR. LAWRENCE: I'm sorry. Objection is calls for  
20 a legal conclusion.

21 THE COURT: Sustained.

22 BY MR. GLEESON:

23 Q. Did you have an understanding as to what the role of a  
24 transaction list would be in the bank's obligations under  
25 the agreement?

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1 MR. LAWRENCE: Objection; same objection.

2 THE COURT: Sustained.

3 BY MR. GLEESON:

4 Q. The -- where would the money -- would this agreement be  
5 executed at the bank under your supervision?

6 A. Yes.

7 Q. Okay. Were there people at the bank who would actually  
8 undertake the steps necessary to move funds from the PCI  
9 account to the deposit account?

10 A. Yes, given that receipt of a transaction list would  
11 dictate when and if those funds were to be moved.

12 Q. Okay. And would the funds be moved without the receipt  
13 of a transaction list?

14 A. No.

15 Q. Okay. And where would the funds be moved to?

16 A. They would be moved to the new depository account, with  
17 the beneficiary being Palm Beach.

18 Q. Okay. And then Section 2(c) --

19 MR. GLEESON: Let's go back to 2(b). Excuse me,  
20 Mr. Herzka.

21 BY MR. GLEESON:

22 Q. In terms of implementing the agreement and moving money  
23 from the PCI account, was the transaction list the first  
24 step?

25 MR. LAWRENCE: Objection, calls for a legal

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1 conclusion.

2 THE COURT: Overruled.

3 THE WITNESS: Yes. My understanding is to  
4 receive -- the transaction list was the first step, having  
5 executed the agreement --

6 BY MR. GLEESON:

7 Q. Okay.

8 A. -- to move monies, yes.

9 Q. And moving the money would be the second step?

10 A. Correct.

11 MR. GLEESON: If you could go to 2(c), please,  
12 Mr. Herzka.

13 BY MR. GLEESON:

14 Q. That says, "M&I shall compare each payment received by  
15 wire transfer or otherwise to the most recently received  
16 Transaction List provided to it by Petters and shall  
17 automatically transfer each payment on a Transaction funded  
18 by a Protected Party to an M&I account established by and  
19 for the benefit of each Protected Party as required herein."  
20 Do you see that?

21 A. Yes.

22 Q. Okay. That was an obligation -- excuse me. Did that  
23 impose an obligation?

24 A. Yes. That's what our role was in executing this  
25 agreement, was to receive -- upon receipt of a transaction



Crain - Direct

1 list, compare the payments received from the beneficiary in  
2 this case and then move it to that account.

3 Q. Okay. And the -- by moving them to the account, is  
4 anybody protected?

5 MR. LAWRENCE: Objection, calls for a legal  
6 conclusion, foundation.

7 THE COURT: Sustained.

8 BY MR. GLEESON:

9 Q. Is there protection afforded to Palm Beach by this  
10 provision in the agreement?

11 A. Yes, the --

12 MR. LAWRENCE: Same objection.

13 THE COURT: Sustained.

14 BY MR. GLEESON:

15 Q. The transaction list you mentioned -- was this agreement  
16 eventually executed?

17 A. Yes, the agreement was executed.

18 Q. Did M&I Bank ever receive a transaction list?

19 A. Not that I'm aware of, no.

20 Q. Did it ever receive a complaint from anyone that a  
21 transaction list hadn't been received?

22 MR. LAWRENCE: Objection, relevance.

23 THE COURT: Overruled.

24 MR. GLEESON: I'm sorry?

25 THE COURT: I said, "Overruled."

Crain - Direct

1 THE WITNESS: No.

2 BY MR. GLEESON:

3 Q. You worked with Chris Flynn?

4 A. Yes.

5 Q. You got to know him?

6 A. Yes.

7 Q. Did you find him to be honest?

8 A. Yes.

9 Q. Ever give you any reason to question his honesty?

10 A. No.

11 MR. LAWRENCE: Objection, improper character.

12 THE COURT: Sustained.

13 MR. GLEESON: Excuse me?

14 THE COURT: Sustained.

15 MR. GLEESON: Can I approach?

16 THE COURT: You may.

17 **(At sidebar)**

18 MR. GLEESON: Under 608(b) of the Federal Rules of  
19 Evidence, if somebody's honesty is attacked, I'm permitted  
20 to elicit testimony about his honesty. This is from a  
21 person who knows him.

22 Chris Flynn was the person who was accused of  
23 editing a MIContact report, of destroying a document. He  
24 had the judge's protective order read to him on that witness  
25 stand as though he had violated that order.

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1 THE COURT: As though he --

2 MR. GLEESON: As though he had violated that order  
3 by editing a MIContact report. His honesty was directly  
4 challenged by Mr. Marder's questioning. And I'm permitted,  
5 I respectfully suggest to the Court, to elicit testimony  
6 about his truthfulness from someone in a position to know.

7 MR. LAWRENCE: Your Honor, although there has been  
8 questions in evidence about Mr. Flynn's conduct, his honesty  
9 or his character for truthfulness has not been put at issue.  
10 So under the rules we have not opened the door to this type  
11 of character evidence and we would request that the last two  
12 questions and answers -- I believe it's two -- be struck.

13 THE COURT: Anything else?

14 MR. GLEESON: Nothing could go more to the heart  
15 of somebody's honesty than the accusation that they edited a  
16 document and then destroyed a document in defiance of a  
17 court order. There's nothing more dishonest than that.

18 THE COURT: I will sustain the objection.

19 MR. LAWRENCE: And, Your Honor, will you strike  
20 the last two answers about his character?

21 THE COURT: I will.

22 **(In open court)**

23 MR. LAWRENCE: Your Honor, I renew my motion to  
24 strike the, I believe, last two answers.

25 THE COURT: The last two answers are stricken.

1 You are not to consider those answers in your deliberations  
2 or consideration of this case.

3 MR. GLEESON: May I continue, Judge?

4 THE COURT: You may.

5 BY MR. GLEESON:

6 Q. In connection with this Deposit Account Agreement, you  
7 were -- were you involved in it every step of the way?

8 A. I think for the most part, yes.

9 Q. Okay. Were you -- did Chris Flynn keep you in the loop?

10 A. Yes, he did.

11 Q. Okay. Did you ever observe any indication that he was  
12 hiding his work from you?

13 MR. LAWRENCE: Objection, same basis as before and  
14 relevance.

15 THE COURT: Overruled. You may answer.

16 THE WITNESS: No.

17 BY MR. GLEESON:

18 Q. Did you ever observe any indication that he altered bank  
19 records?

20 MR. LAWRENCE: Objection, foundation, improper.

21 THE COURT: Establish the foundation.

22 BY MR. GLEESON:

23 Q. Did you make observations of Chris Flynn in the  
24 workplace?

25 A. Yes.

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1 Q. Did he say things to you?

2 A. Yes.

3 Q. Did you say things to him?

4 A. Yes.

5 Q. Did you see him in the workplace?

6 A. Yes.

7 Q. Did you ever make any observation that indicated to you  
8 that he altered bank records?

9 MR. LAWRENCE: Objection, foundation, improper  
10 character testimony.

11 THE COURT: Sustained. Counsel, move on.

12 BY MR. GLEESON:

13 Q. You left the bank in 2012?

14 A. Yes.

15 Q. Ten years ago?

16 A. Yes.

17 Q. Okay. Do you know the law -- that this lawsuit was  
18 filed in that year?

19 A. Yes.

20 Q. You left for Bremer Bank, correct?

21 A. Correct.

22 Q. Okay. And to a degree, you stayed involved in this  
23 lawsuit?

24 A. Yes.

25 Q. You were -- were you deposed?

Crain - Direct

1 A. Yes.

2 Q. Okay. And you are here today?

3 A. Yes.

4 Q. Are you familiar, generally, with the allegations?

5 A. Yes.

6 Q. Between the period of June of 2007 and the end of  
7 September of 2008, were you at M&I Bank?

8 A. Yes.

9 Q. Were you in senior management at the bank?

10 A. Yes.

11 Q. Allegations in this case are serious, correct?

12 A. Yes.

13 Q. Did you take them seriously?

14 A. Yes.

15 Q. You know the bank was charged by Mr. Kelley of having  
16 actual knowledge of the Ponzi scheme while it was underway?

17 MR. LAWRENCE: Objection, assumes facts not in  
18 evidence and legal conclusion.

19 THE COURT: Sustained.

20 MR. GLEESON: Excuse me, Judge. I just want to  
21 refresh.

22 (Defendant's counsel confer)

23 BY MR. GLEESON:

24 Q. Do you recall the allegations in the Complaint in this  
25 case in 2012?

Crain - Direct

1 A. Yes.

2 Q. Okay. You were part of senior management during the  
3 period that those allegations related to, correct?

4 A. Yes.

5 Q. Okay. Did the allegations include the contention by  
6 Mr. Kelley that the bank had actual knowledge of the Ponzi  
7 scheme while it was underway?

8 MR. LAWRENCE: Objection, relevance, misstates  
9 facts, calls for legal conclusion. And we may need a  
10 sidebar on this, Your Honor.

11 THE COURT: I will sustain the objection.

12 MR. GLEESON: Can I have a sidebar on it, please?

13 THE COURT: We'll take our midafternoon break,  
14 Members of the Jury.

15 Members of the Jury, please remember to not  
16 discuss this case with anyone, including other jurors,  
17 members of your family, other people involved in the trial.

18 And when I indicate don't discuss the case with  
19 anyone, please also remember not to do any kind of text  
20 messaging, blogging, or other types of communication, oral  
21 or written, as I have instructed you before. Do not consult  
22 any references or read any newspaper articles or anything  
23 like that.

24 You must keep an open mind free of outside  
25 information, and you understand your oath that you've taken

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1 and that it requires you to do just that.

2 So we will take our break now and begin to --  
3 we'll plan to return to the courtroom at five minutes after  
4 3:00. Have a good break.

5 THE LAW CLERK: All rise for the jury.

6 **IN OPEN COURT**

7 **(JURY NOT PRESENT)**

8 THE COURT: And you are excused from the witness  
9 stand during this break.

10 We'll take up the issue that needs to be taken up  
11 at this time, if there is one.

12 MR. GLEESON: Yes. I'll wait for the witness to  
13 be excused.

14 (Witness excused from courtroom)

15 MR. GLEESON: Can I be heard on this last  
16 objection that was sustained, Judge?

17 THE COURT: The Court has addressed that. I  
18 thought there were other issues that needed to be addressed.  
19 No?

20 MR. GLEESON: I would like to address that. I  
21 would like to apply to the Court and to listen to the  
22 reasons why that objection should not have been sustained,  
23 if I can make a record, at least. May I, please?

24 THE COURT: You may.

25 MR. GLEESON: Mr. Kelley was allowed to testify



Crain - Direct

1 last week about why he brought his lawsuit, and he said he  
2 had a good-faith basis to bring this lawsuit. But this  
3 lawsuit is not just a claim that M&I Bank, quote, should  
4 have investigated more fully. I think they should have  
5 reported this to the feds, closed quote, that's what  
6 Mr. Kelley testified to. That's the lawsuit he said he  
7 brought in good faith. Incidentally -- and this is our  
8 Rule 50 motion -- that lawsuit should be dismissed.

9 But the really important thing, Your Honor, is I  
10 want to ask questions that shed further light on what this  
11 lawsuit that Mr. Kelley said he brought in good faith is or  
12 maybe was until his direct testimony in the case.

13 In both the original Complaint and the -- in 2012  
14 and the Amended Complaint in 2016, the same sentence is  
15 present. It's in paragraph 97 of the original Complaint,  
16 which is docketed on November 14th, 2012, that M&I had  
17 actual knowledge of the fraud. That very serious  
18 allegation -- it was repeated in paragraph 161 of the  
19 Amended Complaint in 2016 right before the depositions.

20 That extremely serious allegation has permeated  
21 this case for a decade until last Thursday when Mr. Kelley  
22 changed course, apparently. There's been no formal  
23 withdrawal. But you heard his testimony as well as the rest  
24 of us. And the -- it actually affected the trial. It's  
25 been part of the trial.

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1 Chris Flynn was accused of entering into that DACA  
2 agreement -- it's a DAMA, Deposit Account Management  
3 Agreement -- without telling his boss. He's accused of  
4 editing MIFontacts reports. He was accused, in front of the  
5 jury, of -- by the questioning of Mr. Marder of violating  
6 the court order.

7 And when Mr. Kelley said -- was asked whether,  
8 last Thursday, whether he was claiming that M&I employees  
9 knew there was a Ponzi scheme going on, he said no. That  
10 may be true now, but that -- there was no good-faith basis.

11 He was able to sit there, Judge, after having  
12 provided his qualifications and his life experience, and say  
13 that he thought essentially -- he thought carefully what was  
14 appropriate and he brought this lawsuit in good faith.

15 THE COURT: Counsel, what's the basis for your  
16 argument?

17 MR. GLEESON: My basis for the argument is I want  
18 the jury to know what this lawsuit that Mr. Kelley claims to  
19 have brought in good faith actually consisted of. He  
20 mentioned half of it, a part of it. We think it's important  
21 and relevant to how the case was presented and to undermine  
22 his testimony.

23 THE COURT: Understood. I'll hear opposing  
24 argument, and then we will take our break.

25 MR. LAWRENCE: I will be brief, Your Honor.

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1           The scope of the pleadings is not what's at issue.  
2           This is just a preview of the Rule 50 argument they are  
3           trying to make.

4           The problem is that this witness is offering  
5           opinion testimony about the allegations in this Complaint.  
6           She's not an appropriate witness to do that. One, she can't  
7           provide opinion testimony on this issue. She's not a  
8           representative of the bank. She was not a representative of  
9           the bank at the time that the Complaint was filed.

10          So she lacks foundation to talk about this in the  
11          first place, but it's also just improper opinion. So even  
12          if it was permitted for them to make this sort of argument  
13          with a witness, this is not the witness that they should do  
14          it with.

15          The reason why I hesitantly asked for a sidebar  
16          when I raised the objection was to caution the Court that we  
17          believe this entire line of questioning is improper.

18          MR. GLEESON: This is no opinion. This is a fact.  
19          These are Mr. Kelley's allegations. Over our objection,  
20          Judge, he was permitted to tell the jury, Solomon-like, that  
21          here is what he looked at, here's what he decided. I  
22          brought this in good faith. I'm not saying they had actual  
23          knowledge. And that was wrong. He created a misimpression  
24          that, respectfully, we should be permitted to correct.

25          MR. LAWRENCE: I will only add that they had the

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1 opportunity to cross Mr. Kelley and they did.

2 THE COURT: The objection is overruled -- is  
3 sustained, excuse me.

4 THE LAW CLERK: All rise.

5 (Recess taken at 2:53 p.m.)

6 \* \* \* \* \*

7 (3:10 p.m.)

8 **IN OPEN COURT**

9 **(JURY PRESENT)**

10 THE COURT: Good afternoon. Please be seated.

11 MR. GLEESON: May I continue, Judge Wright?

12 THE COURT: Yes, you may.

13 MR. GLEESON: Thank you.

14 Mr. Herzka, could you pull up Plaintiff's 705 in  
15 evidence, please.

16 BY MR. GLEESON:

17 Q. Ms. Crain, this is titled "Summary of Overdraft  
18 Activity." Do you see that?

19 A. Yes.

20 Q. Have you seen it before?

21 A. Yes.

22 Q. Okay. When did you first see it?

23 A. When I was preparing for trial.

24 Q. Okay. There are seven entries on the chart.

25 MR. GLEESON: Thank you, Mr. Herzka.

Crain - Direct

1 BY MR. GLEESON:

2 Q. Four of which are dated in 2008, correct?

3 A. Yes.

4 Q. Okay. One is 2005. Another is 2005. And the last is  
5 2003, correct?

6 A. Yes.

7 Q. The first three on the chart are dates before you were  
8 at M&I Bank, correct?

9 A. Yes.

10 Q. Okay. Have you personally been involved with those  
11 bottom four transactions, the February 8th, February 14th,  
12 August 4th, August 6th of 2008 transactions?

13 A. Yes.

14 Q. Okay. Have you personally been involved in an  
15 allegation that they were loans to PCI?

16 A. Yes. I had a chance to review them as part of an  
17 affidavit I signed.

18 Q. Okay. In this case?

19 A. No. It was in a different case.

20 Q. Okay. Prior -- before this?

21 A. Correct.

22 Q. Brought by whom?

23 A. I believe Bankruptcy Trustee Doug Kelley.

24 Q. Okay. When was that case?

25 A. In 2010.

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1 Q. Okay. Against whom?

2 A. M&I Bank.

3 Q. What happened to that case?

4 MR. LAWRENCE: Objection, relevance and  
5 foundation.

6 THE COURT: Sustained.

7 MR. GLEESON: May I approach, Judge?

8 THE COURT: No.

9 MR. GLEESON: No?

10 THE COURT: No. You may proceed with your  
11 questioning.

12 MR. GLEESON: Okay.

13 BY MR. GLEESON:

14 Q. The -- did you have occasion back then to determine  
15 whether the four transactions listed at the bottom of -- the  
16 2008 transactions created a debtor/creditor relationship?

17 A. Yes.

18 MR. LAWRENCE: Objection [inaudible].

19 THE COURT REPORTER: I don't think your microphone  
20 is on.

21 THE COURT: No. I can't hear you.

22 MR. LAWRENCE: My apologies. The objection was to  
23 foundation as to time.

24 THE COURT: Sustained.

25 BY MR. GLEESON:

Craig - Direct

1 Q. Did you look into those four transactions?

2 A. Yes, I did.

3 Q. Okay. When for the first time?

4 A. After the -- there was a case that was filed against M&I  
5 Bank indicating that these were loans made by the bank --

6 MR. LAWRENCE: Objection, relevance. Move to  
7 strike.

8 THE COURT: Sustained.

9 BY MR. GLEESON:

10 Q. The -- you're familiar with --

11 THE COURT: Let me stop here. Members of the  
12 Jury, when I grant a motion to strike, that means you are  
13 not to consider that information. Okay?

14 You may proceed.

15 MR. GLEESON: Thank you, Judge.

16 BY MR. GLEESON:

17 Q. You're familiar with the process pursuant to which  
18 checks get cleared at banks, correct?

19 A. Yes, I am.

20 Q. Okay. And could you describe to the jury the process  
21 when a check is presented to a bank and there are  
22 insufficient funds in the checking account, in a deposit  
23 account.

24 A. Yes. How it works is as checks are presented to -- and  
25 go through an account for clearing, there's an -- and if

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1       there aren't enough funds in the account, the customer has  
2       an opportunity to make a deposit to fund those, anything  
3       clearing the account, and they have until midnight of the  
4       next day to do that.

5       Q.   So if a check comes in -- for clarity purposes, let's  
6       try to give an example to the jury.  If a check comes in at  
7       Tuesday at noon and there are insufficient funds in the  
8       account to pay the check -- you with me so far?

9       A.   Yes.

10      Q.   -- what are the options that a bank has?

11      A.   The bank can either determine to pay it or return the  
12      check.

13      Q.   Okay.  And if it's not paid and not returned, the check  
14      is still at the bank, correct?

15      A.   Yes.

16      Q.   Okay.  And what are the -- what's the process if the --  
17      at the end of the day there's insufficient funds in the  
18      account?

19      A.   Can you please ask that question again?

20      Q.   Sure.  When, if ever, does such a check come -- become a  
21      loan to the bank -- a loan to the customer, excuse me?

22      A.   Sure.  If the bank determined not to return the check  
23      and there was not enough funds in the account to honor the  
24      check, pay the check, the next day we would recognize an  
25      overdraft or -- which would be essentially a loan to the



1 customer.

2 Q. Okay. And is there a time within which a customer can  
3 present -- can put funds in the account sufficient to pay  
4 the check?

5 A. Yes. They -- yes.

6 Q. How long does the customer have to do that?

7 A. They have until midnight of the following business day.

8 Q. Okay. And is that a matter of bank policy?

9 MR. LAWRENCE: Objection, vague as to "bank" and  
10 foundation.

11 THE COURT: Overruled. You may answer.

12 THE WITNESS: It's both bank policy and it's under  
13 the Uniform Commercial Code in how banks operate.

14 BY MR. GLEESON:

15 Q. And we'll spare the jury much detail on what the Uniform  
16 Commercial Code is, but can you tell us generally what --  
17 that's referred to as the UCC, correct?

18 A. Yes.

19 Q. And can you tell us generally what the UCC is --

20 MR. LAWRENCE: Objection.

21 Q. -- as it relates to banking?

22 MR. LAWRENCE: Objection, legal testimony and  
23 improper opinion.

24 THE COURT: Sustained.

25 BY MR. GLEESON:

Crain - Direct

1 Q. Is that the law that establishes the bank's obligations  
2 in this regard?

3 MR. LAWRENCE: Objection. Same basis as before,  
4 plus leading.

5 THE COURT: Sustained.

6 BY MR. GLEESON:

7 Q. Is what you are saying about the insufficient funds and  
8 having until the next day at midnight just a policy of the  
9 bank or is it also the law?

10 MR. LAWRENCE: Objection. Same as before,  
11 including leading.

12 THE COURT: Sustained.

13 BY MR. GLEESON:

14 Q. Okay. If sufficient funds are put in the account by  
15 midnight the next day and then the check is paid, does that  
16 produce a loan to the customer?

17 A. No, it does not.

18 Q. Okay. The check is paid and funds are placed into the  
19 account at the right time, correct?

20 A. Correct.

21 MR. LAWRENCE: Objection, leading.

22 THE COURT: Sustained.

23 MR. GLEESON: I'm sorry?

24 THE COURT: Sustained. And asked and answered.

25 BY MR. GLEESON:

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1 Q. Did you have occasion to check the bank's records with  
2 regard to each of the seven entries on this chart?

3 A. I remember checking the bank's records for the ones in  
4 2008, the four in 2008.

5 Q. And in this -- since this -- since last Thursday have  
6 you had occasion to check the accounts -- the bank's records  
7 with regard to the first three?

8 A. Yes. All of them in that regard, yes.

9 Q. Okay. Can you describe to the jury what you determined  
10 with regard to each of those transactions.

11 A. That there was not -- they were not -- I would not deem  
12 any of them as overdrafts. They were not -- there was  
13 always a positive balance on the day that we would have, you  
14 know, looked at it in terms of determining the status of the  
15 customer's account.

16 Q. Did all of these transactions involve checks?

17 A. Yes.

18 MR. GLEESON: Mr. Herzka, could you pull up  
19 Plaintiff's 1 at page 548, please, and if you could put it  
20 side by side with the exhibit that was just up there. Thank  
21 you.

22 BY MR. GLEESON:

23 Q. The --

24 THE COURT: Counsel, for the record, the other  
25 exhibit number, would you just identify that?

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1 MR. GLEESON: Yes, Judge. It's Plaintiff's 1.

2 THE COURT: Yes. Compared to the other exhibit?

3 MR. GLEESON: Oh, it's up there next to  
4 Plaintiff's 705.

5 THE COURT: Thank you.

6 MR. GLEESON: Sure, Judge.

7 BY MR. GLEESON:

8 Q. And the August 6th transaction on Plaintiff's 705  
9 reflects a \$115,906.72 negative balance, correct?

10 A. Yes, it does.

11 Q. Okay. If you look to, on page 548 --

12 MR. GLEESON: And maybe we can remove 705, please,  
13 Mr. Herzka.

14 BY MR. GLEESON:

15 Q. If you look at Plaintiff's 1 at 548 on August 6th, do  
16 you see three checks there on August 6th?

17 A. Yes, I do.

18 MR. GLEESON: And if you can tighten up that box,  
19 please, and focus just on the checks, Mr. Herzka.

20 BY MR. GLEESON:

21 Q. This reflects checks coming into the account on  
22 August 6th, correct?

23 A. Yes, it does.

24 Q. Okay. And then on the right side, at the end of the  
25 August 6th entries, you see that negative balance of

Crain - Direct

1 115,906.72, correct?

2 A. Yes.

3 Q. The -- then right below that, the closing balance on  
4 August 7th is what?

5 A. 757,567.94.

6 Q. So by the end of August 7th there was a positive balance  
7 in the deposit account, correct?

8 A. Correct.

9 Q. How does that bear on whether the debit of 115,906.72 at  
10 the end of August 6th was a loan or not?

11 MR. LAWRENCE: Objection, legal conclusion, as  
12 well as improper opinion with respect to information the  
13 witness did not contemporaneously look at.

14 THE COURT: Overruled. You may answer if you can.

15 THE WITNESS: Sure. So we, the bank -- if you  
16 look at the three checks at the very top of this, one for  
17 113, one for 64, one for 32,000, all of those the bank had  
18 an opportunity to return by the following day to avoid an  
19 overdraft. Enough deposits came in on the 7th where that  
20 wasn't necessary to do.

21 BY MR. GLEESON:

22 Q. And so there were sufficient funds by midnight the  
23 following day?

24 A. Correct.

25 Q. Okay. Does that mean it did not become a loan?

Crain - Direct

1 A. Yes.

2 Q. Okay. Did you conduct a similar analysis with regard to  
3 all seven of the transactions on Plaintiff's 705?

4 A. Yes.

5 Q. Okay. You testified earlier --

6 MR. GLEESON: May I please approach, Your Honor?

7 THE COURT: You may.

8 **(At sidebar)**

9 MR. GLEESON: Judge, I just want to make an offer  
10 of proof just so the record reflects what's been precluded.

11 In 2010 Mr. Kelley sued the bank, contending that  
12 those four transactions in 2008 were alarms. There was some  
13 back and forth between his lawyers and the lawyers for the  
14 bank.

15 Ms. Crain provided a declaration, provided it to  
16 Mr. Kelley's lawyers; and eight days later, because of her  
17 declaration, they dismissed the lawsuit because these are  
18 not loans under the UCC. You have what's called the  
19 midnight rule in the UCC. They were never loans, and  
20 Mr. Kelley recognized that and dismissed the lawsuit.

21 But his expert witness, all these years later, has  
22 identified those same four transactions as loans.

23 Obviously, as a factual matter we've established that they  
24 are not and we can argue that in front of the jury.

25 But we think it's very important -- when the

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1 plaintiff in the case brings a lawsuit and then dismisses it  
2 and his lawyers are provided with a declaration identical to  
3 her testimony and then later on has his own expert provide  
4 the same allegation, the inference is he recognized then  
5 that it was essentially frivolous -- it was frivolous.  
6 These are not loans in any respect.

7 But he recognized that and then he had his own  
8 expert, contrary to the resolution of that 2012 case  
9 involving the same parties, involving this witness, had his  
10 own expert come forth and provide her testimony that this  
11 was improper activity, these were gargantuan loans that were  
12 a gigantic red flag and it wasn't presented to the loan  
13 committee.

14 It was irresponsible and it undermines the  
15 expert's testimony in a way that is -- to my mind and to our  
16 mind, we're deprived of arguing that to the jury. That's  
17 the offer of proof I wanted to make. The very same trustee,  
18 very same plaintiff abandoned these claims ten years ago  
19 because they were frivolous and here they are. We should be  
20 permitted to argue that to the jury.

21 Thank you.

22 **(In open court)**

23 BY MR. GLEESON:

24 Q. Ms. Crain, did you ever have any contact in person with  
25 any of the people at PCI?

Crain - Cross

1 A. I did not.

2 Q. Okay. Did you ever speak to them by phone?

3 A. No, I did not.

4 Q. Did you ever receive any benefits of any sort from or on  
5 behalf of PCI?

6 A. I did not.

7 Q. No one took you to dinner or gave you Twins tickets or  
8 paid you some money, anything like that?

9 A. No.

10 MR. GLEESON: Okay. Thank you. I have no further  
11 questions of this witness.

12 THE COURT: Anything further for this witness?

13 MR. LAWRENCE: Yes, Your Honor. May we have a  
14 moment just to set up?

15 THE COURT: Yes, you may.

16 MR. LAWRENCE: Thank you.

17 (Pause)

18 MR. LAWRENCE: May I proceed, Your Honor?

19 THE COURT: You may.

20 **CROSS-EXAMINATION**

21 BY MR. LAWRENCE:

22 Q. Good afternoon, Ms. Crain.

23 A. Good afternoon.

24 Q. You've heard me talking from over there, but we haven't  
25 really been able to see one another. My name is Ryan



1 Lawrence. I represent the trustee.

2 You said during your direct examination that you  
3 didn't join M&I Bank until June of 2007, correct?

4 A. Correct.

5 Q. And you recall that the FBI raid that shut down the  
6 Petters scheme took place in September of '08?

7 A. Yes.

8 Q. So you were only at M&I for approximately a year and  
9 three months during the time period that -- you know, prior  
10 to that FBI raid, right?

11 A. Correct.

12 Q. Okay. And it was sort of at the very end of the Ponzi  
13 scheme that you were at M&I Bank?

14 A. Yes, that's the time frame I was there.

15 Q. Okay. And is it fair to say that you didn't have very  
16 much personal knowledge about what was happening with  
17 respect to PCI's account at M&I Bank during the time that  
18 you worked there?

19 A. I didn't work on it directly, no.

20 Q. And you were -- you said Chris Flynn reported to you,  
21 correct?

22 A. Yes.

23 Q. Okay. And you were relying on Mr. Flynn to keep you  
24 apprised of anything important about the PCI account that  
25 would need to be brought to your attention; fair?

Crain - Cross

1 A. Yeah. Generally, yes.

2 Q. He -- you expected him to know his customers' business?

3 A. I would expect him to know what he needed to do to take  
4 care of the current relationship, yes.

5 Q. And that involves knowing about his customers' business;  
6 fair?

7 A. For the nature of the business we had as a depository  
8 account, yes. It depends on the types of transactions and  
9 relationship you have with the customer that defines that, I  
10 guess.

11 Q. Regardless of the type of relationship that the bank has  
12 with the customer, knowing your customers' business is just  
13 part of being a good banker, right?

14 A. Understanding their industry that they are in generally,  
15 yes.

16 Q. And that means understanding their business; fair?

17 A. I guess I would -- I'm not sure if I understand the  
18 nature of the question in terms of what you are asking me  
19 that he would understand.

20 Q. Ms. Crain, do you recall that you were deposed in this  
21 matter?

22 A. Yes.

23 Q. And you were under oath during that deposition, right?

24 A. Yes.

25 Q. And you provided truthful testimony?

1 A. Yes.

2 MR. LAWRENCE: Permission to approach the witness,  
3 Your Honor?

4 THE COURT: You may.

5 (Document handed to witness)

6 MR. LAWRENCE: Permission to approach the bench,  
7 Your Honor?

8 THE COURT: You may.

9 (Document handed to the Court)

10 BY MR. LAWRENCE:

11 Q. Ms. Crain, what I have handed you is a copy of your  
12 deposition transcript dated December 18th, 2017. Do you see  
13 that in front of you?

14 A. I do.

15 Q. I'm going to direct your attention --

16 MR. LAWRENCE: I'm sorry, Counsel. Do you need a  
17 copy?

18 MR. GLEESON: I do not.

19 BY MR. LAWRENCE:

20 Q. I'm going to direct your attention to page 29 of that  
21 transcript. If you could just let me know when you are  
22 there.

23 A. Okay.

24 Q. And in that deposition were you asked this question and  
25 did you provide this answer?

Crain - Cross

1 "Question: So knowing your customers' business is just  
2 part of being a good banker?

3 "Answer: Correct."

4 A. Yes.

5 Q. You can set that aside for now.

6 That being -- the knowing your customers' business  
7 is part of being a good banker, that was true during your  
8 time at M&I, right?

9 A. Yes.

10 Q. And it's still true now?

11 A. Yes.

12 Q. Okay. In fact, understanding a customer's business is  
13 particularly helpful in trying to cross-sell products and  
14 services to the customer; fair?

15 A. Yes.

16 Q. And when you were in charge of the business banking  
17 group at M&I for the Minnesota region, you expected your  
18 business bankers to cross-sell?

19 A. Yes.

20 Q. On direct I believe you testified that that was one of  
21 the expectations that you had of Mr. Flynn in particular?

22 A. Yes.

23 Q. And knowing your customer, it's not just important for  
24 cross-selling purposes. It's also important for anti-money  
25 laundering purposes as well, right?

1 A. Well -- I'm sorry. I'm not understanding the question.

2 Q. Yeah. Knowing -- so knowing your customer is important  
3 for anti-money laundering purposes; is that correct?

4 A. Comprehensively, yes.

5 Q. So having a comprehensive understanding of your customer  
6 is important for AML purposes?

7 A. It -- knowing -- understanding the nature of the  
8 customer's industry and business, yes.

9 Q. That's just standard protocol in the banking industry?

10 A. Yes. And we -- yes.

11 Q. Would you agree that the bank's employees, from the  
12 people in the AML room all the way up to the business  
13 bankers, they are the bank's first line of defense to  
14 prevent fraud or other criminal activity that is being  
15 routed through the bank?

16 A. I would characterize it as those in the AML Group, as  
17 you referenced, would be the first individuals to manage all  
18 that. I would not expect a business banker to have the same  
19 information an AML group would have.

20 Q. That doesn't mean, however, that the business banker has  
21 no responsibility with respect to AML compliance, right?

22 A. They don't have -- they don't get the same information  
23 that an AML group would have.

24 Q. I appreciate that, but my question is a little bit  
25 different. It's that the business bankers still have AML

1 responsibilities, right?

2 A. Yes, yes, to be aware --

3 Q. They are not allowed to just do nothing?

4 A. Yes.

5 Q. And I think on direct you testified that it's good for a  
6 business banker to be curious?

7 A. Yes.

8 Q. And Chris Flynn, you said, was a good business banker?

9 A. Yes.

10 Q. So he, too, was curious?

11 A. Yes.

12 Q. And despite that, Mr. Flynn never told you that anything  
13 suspicious was going on with respect to PCI's account at  
14 M&I, did he?

15 A. I don't know that Mr. Flynn had any information to give  
16 me that information.

17 Q. And I'm not asking you what Mr. Flynn knew. He was  
18 here; he testified. I'm simply asking you whether --

19 MR. GLEESON: Objection to the prefaces to the  
20 Question, Judge.

21 MR. LAWRENCE: Withdrawn.

22 THE COURT: Overruled.

23 BY MR. LAWRENCE:

24 Q. Let me start over. I'm only asking you whether

25 Mr. Flynn ever communicated to you that there was suspicious

Crain - Cross

1 activity in PCI's account at M&I Bank.

2 A. No, he did not.

3 Q. Okay. He never told you that PCI was doing business  
4 with a money launderer?

5 A. I don't have any reason to believe he would have had  
6 that information to share that with me, no.

7 Q. Again, my question is different. I'm not asking you  
8 what Mr. Flynn knew or did not know. I'm only asking you  
9 whether he ever shared with you that PCI was doing business  
10 with a money launderer.

11 MR. GLEESON: Objection to the form of the  
12 question, "shared."

13 THE COURT: Overruled.

14 MR. GLEESON: Assumes facts not in evidence.

15 THE COURT: Overruled. You may answer the  
16 question.

17 THE WITNESS: Can you please ask the question  
18 again? I want to make sure I'm understanding the context of  
19 the question.

20 BY MR. LAWRENCE:

21 Q. Did Mr. Flynn ever share with you that PCI was in  
22 business with a money launderer?

23 A. No.

24 Q. Okay. Did Mr. Flynn ever share with you that there were  
25 billions of dollars going in and out of the PCI account at

1 M&I on a regular basis?

2 A. No.

3 Q. Did you know that billions of dollars was going in and  
4 out of the account?

5 A. No.

6 Q. Because you didn't have that level of personal  
7 involvement on the ground with the account?

8 A. None of us would in business banking, no.

9 Q. So I assume, then, that nobody told you that even though  
10 there were billions going in and out of the account, the  
11 actual balances in the account were relatively small  
12 compared to that?

13 A. Yes.

14 Q. Yes, nobody told you that?

15 A. I'm sorry. Please ask the question again.

16 Q. Yeah. Nobody at M&I Bank informed you that although  
17 there were billions of dollars going in and out of the PCI  
18 account, the actual end-of-day balances were relatively  
19 small?

20 A. That was the case, yes. I mean, no one told me anything  
21 other than I saw the average balance, yes.

22 Q. So you knew the average balance was small?

23 A. Yes.

24 Q. What you did not know was the billions moving in and  
25 out?



Crain - Cross

1 A. Correct.

2 Q. Mr. Flynn never told you that the transactions in the  
3 PCI account were inconsistent with the business model as the  
4 bank understood it?

5 A. I don't know that we considered it inconsistent with the  
6 nature of Petters' business. I wouldn't characterize it  
7 that way, no.

8 Q. Again, not my question, Ms. Crain. I'll try to be  
9 clear. Mr. Flynn never raised to you a concern that the  
10 activity in the account was inconsistent with his  
11 understanding of what he would have expected to be going on  
12 in the account?

13 MR. GLEESON: Object, I object.

14 THE COURT: Overruled.

15 THE WITNESS: No, he never -- we never had a  
16 conversation in that regard.

17 BY MR. LAWRENCE:

18 Q. And you testified at the very end of your direct  
19 examination that you were actually aware of the large  
20 overdrafts in the account in 2008, right?

21 A. They were not overdrafts.

22 Q. Well, I understood your testimony was that you don't  
23 characterize them as loans in your view, right?

24 A. I -- they are one and the same.

25 Q. So your testimony is that even though there was a

1 negative balance on the account, it was not an overdraft  
2 because the following day money was replenished into the  
3 account?

4 A. Yes, they would not be -- fall into a category of an  
5 official overdraft or loan because we still had an  
6 opportunity to return a check. So they were in a  
7 nonsufficient funds status, and then we had until the next  
8 business day to determine whether to return them. And If we  
9 did not return them and funds weren't deposited, that's when  
10 an overdraft would be created.

11 Q. So you were aware that there were instances where the  
12 PCI account had nonsufficient funds in the hundreds of  
13 thousands of dollars, including at times over a million  
14 dollars?

15 A. As I prepared for the affidavit and for court, yes.

16 Q. I thought you said that contemporaneously, in 2008 when  
17 you were working at the bank and those nonsufficient fund  
18 instances happened, that you were aware of that. Are you  
19 saying you didn't know?

20 MR. GLEESON: Objection, mischaracterizes her  
21 testimony.

22 THE COURT: Overruled. You may answer the  
23 question.

24 THE WITNESS: I did not get that type of  
25 information on a daily basis. We got an daily overdraft

Crain - Cross

1 report, and there were never any overdrafts for those  
2 accounts.

3 BY MR. LAWRENCE:

4 Q. Do you remember discussing with Mr. Flynn any instances  
5 in which PCI had insufficient funds in the account in the  
6 hundreds of thousands or million dollar range?

7 A. I do not.

8 Q. He never told that to you?

9 A. No.

10 Q. And I know that Mr. Jambor was only -- he only had brief  
11 overlap with you, but he never reported anything suspicious  
12 about PCI's account to you either, right?

13 A. No.

14 Q. He never told you that there were checks being paid out  
15 of the account for millions of dollars to PCI's insiders?

16 A. Mr. Jambor wouldn't have had that information, but no.

17 Q. He never told you that there were checks to insiders in  
18 the amounts of millions of dollars?

19 A. No.

20 Q. And those are all -- assuming those happened, those are  
21 all indicators of suspicious activity, right?

22 A. For people who had that information, yes.

23 Q. Yeah. So those are signs of suspicious activity?

24 A. Are you saying that Mr. Jambor had that information?

25 I'm sorry. I'm not following.

Crain - Cross

1 Q. No, Ms. Crain. I'm asking you -- let me -- let's go  
2 step by step.

3 Is a bank's customer doing business with a money  
4 launderer suspicious?

5 MR. GLEESON: Objection. Can I approach?

6 THE COURT: You may.

7 **(At sidebar)**

8 MR. GLEESON: This is outside the scope of the  
9 direct. It's also just summing up. Counsel is summing up  
10 his case. He's not asking her a question. There's no  
11 foundation for the question is the bank officer doing  
12 business with a money launderer suspicious. That's the  
13 subject of expert testimony.

14 I've been very narrowly circumscribed in my  
15 examination to the testimony of this witness as a percipient  
16 witness to discrete factual events. What you are seeing now  
17 is bouncing off this witness the themes of the plaintiff's  
18 case, not asking her for events that she participated in. I  
19 was certainly not permitted to ask her to conjecture, to  
20 provide testimony about what would have happened if events  
21 came to her attention.

22 So I object on those grounds.

23 MR. LAWRENCE: Two responses.

24 First, on the direct they elicited testimony that  
25 she supervised Mr. Flynn and that he was a good business

Crain - Cross

1 banker. This is legitimate cross-examination about what she  
2 saw or didn't see in her supervisory capacity at the bank.

3 Second, we have been going through this trial  
4 where the cross-examinations are not limited to the scope of  
5 the direct because we are only calling witnesses once. In  
6 theory, we could call this witness as a rebuttal witness,  
7 but we are only going to call them a single time, so we  
8 believe we should be given latitude with respect to the  
9 scope of cross.

10 MR. GLEESON: The last argument is false. She was  
11 not on their witness list. So the notion that we can go  
12 beyond the scope of direct when they call one of our  
13 witnesses just doesn't apply here.

14 THE COURT: Yeah, I agree. So that's not a basis  
15 for my ruling.

16 MR. GLEESON: He --

17 THE COURT: Go ahead.

18 MR. GLEESON: And he's -- I'm sorry to interrupt  
19 the Court.

20 THE COURT: Go ahead.

21 MR. GLEESON: And he's not asking her about facts.  
22 He's asking her just to give her opinion about the bank  
23 doing business with a money launderer. It's not -- there's  
24 no factual information being elicited from the witness, and  
25 these questions are utterly at odds with the boundaries in

Crain - Cross

1 which my direct examination was constrained.

2 MR. LAWRENCE: One more point, Your Honor. There  
3 was an entire section of the direct examination about how  
4 much time she spent in the banking industry and her  
5 familiarity with the banking standards. So, again, I think  
6 this is fair cross-examination, Your Honor.

7 THE COURT: I overrule the objection only for  
8 purposes of the last point that you made. You need to keep  
9 it close and you need to move forward.

10 MR. LAWRENCE: Understood, Your Honor. I will.

11 **(In open court)**

12 BY MR. LAWRENCE:

13 Q. Thank you, Ms. Crain. I believe the last question that  
14 I'd asked you was that it would be suspicious for a bank's  
15 customer to be doing business with a money launderer, right?

16 A. If you knew you were -- they were working with a money  
17 launderer, yes, certainly.

18 Q. That's a sign of suspicious activity?

19 A. I mean, I have no -- I don't know that any of us knew  
20 that anybody was doing business with a money launderer, so  
21 it feels like a very general question. But, yes, if  
22 someone -- one of your customers, any one of your customers  
23 is working with a money launderer, that would be suspicious,  
24 yes.

25 Q. And it's suspicious if the company is paying billions of

Crain - Cross

1 dollars to its insiders?

2 A. It depends on the nature of their business.

3 Q. It's suspicious if there's billions of dollars moving in  
4 and out of the account on the same day in equivalent  
5 amounts?

6 A. It's unusual activity, but it does depend on the  
7 business.

8 Q. And were you aware that the Searchspace software for  
9 every month from 2005 to 2008 was setting off alerts for the  
10 9018 account?

11 MR. GLEESON: Objection, foundation.

12 THE COURT: Overruled.

13 THE WITNESS: I wasn't at the bank until 2007, but  
14 I was not aware of anything, no.

15 BY MR. LAWRENCE:

16 Q. So from the period June 2007, when you joined the bank,  
17 to September of 2018, you were not aware of the AML alerts  
18 going off?

19 A. Did you say AML alerts? No.

20 Q. Nobody from M&I's AML Monitoring Group ever contacted  
21 you about the activity in the account?

22 A. They did not.

23 Q. But they would have known that they could have reached  
24 out to the business bankers if they had questions; fair?

25 A. Yes.

1 Q. Fair to say that M&I Bank saw -- or let me ask you a  
2 different question.

3 Did you see Tom Petters as a business development  
4 opportunity for M&I Bank?

5 A. Yes.

6 Q. And is it your understanding that Chris Flynn saw Tom  
7 Petters as a business development opportunity?

8 A. Tom Petters' company, yes.

9 Q. In fact, I believe you said on direct examination that  
10 during the time at which you worked at M&I Bank, the bank  
11 was trying to increase its presence in Minnesota, right?

12 A. Yes, that's correct.

13 Q. And that means acquiring more clients within the state?

14 A. Yes, that's correct.

15 Q. High-profile clients?

16 A. Any clients that fit the opportunity for the  
17 organization, sure.

18 Q. And I think you said that Tom Petters was a well-known  
19 person at the time, especially within Minnesota; fair?

20 A. Yes. I believe he was a well-known person, yes.

21 Q. He had a lot of different businesses? You testified  
22 about Sun Country and Fingerhut?

23 A. Correct.

24 Q. Okay. So he would have -- you know, getting more  
25 business from Tom Petters would have been a good way for the



Crain - Cross  
1 bank to improve its presence in Minnesota; fair?

2 A. Yes.

3 Q. And that is principally -- withdrawn. Let me ask  
4 something different.

5 If you could turn to P-26. It was one of the  
6 documents that Mr. Gleeson asked you about.

7 A. Okay.

8 Q. And this was the e-mail between you and Chris Flynn with  
9 the MIContact. And if we can go to page 3, you remember  
10 looking at this, right?

11 A. Yes, I do.

12 Q. And you said during your direct examination that Mark  
13 Laumann, Jim Wehmhoff, and Tom Salmen were employees of PCI?

14 A. Yes, that was my understanding.

15 Q. Okay. Do you know that for certain?

16 A. Yes. It indicates that Chris met with the company,  
17 Petters Company, Inc., and he met with these individuals.

18 Q. Okay. But your understanding is just based on the fact  
19 that this MIContacts is filed under Petters Company, Inc.,  
20 right?

21 A. Yes.

22 Q. You don't have any independent knowledge about what  
23 Mr. Laumann, Mr. Wehmhoff, or Mr. Salmen would have done for  
24 PCI?

25 A. I don't know what their roles were, no.

Crain - Cross

1 Q. And when we were talking about this document, I heard  
2 you say on direct that one of the reasons that the bank did  
3 not move forward with any of the opportunities described on  
4 page 3 of Exhibit P-26 and extending onto page 4 was that  
5 the bank didn't have any financial information on PCI. Is  
6 that what you said?

7 MR. GLEESON: Objection to the characterization of  
8 the testimony.

9 THE COURT: Overruled. You may answer if  
10 that's -- the question that was asked.

11 THE WITNESS: I'm not sure if it was in relation  
12 to these particular requests. There was at some point in  
13 time a loan request and that we did not get financial  
14 information. I can't recall which request that was for.

15 BY MR. LAWRENCE:

16 Q. And so I want to make sure that we're on the same page  
17 about what you mean by "financial information."

18 So you're not saying that the bank didn't have  
19 access to financial information about what was happening in  
20 the PCI account at the bank, right?

21 A. By "financial information" I mean proprietary  
22 information to that customer that they would provide us.

23 Q. So you're talking about the types of materials that  
24 would be provided in a loan application?

25 A. Correct.

1 Q. The bank did, however, have access to all of the  
2 transaction activity with respect to PCI's account at the  
3 bank, right?

4 A. Different departments of the bank, yes.

5 Q. Yes. So this exhibit more broadly, P-26, fair to say  
6 that Mr. Flynn was flagging this as some, in his words,  
7 large money opportunities and you agreed that these were  
8 some good-sized opportunities?

9 A. Yes.

10 Q. You can set that aside.

11 And if I could -- sorry. One more question.  
12 Those opportunities -- those good-sized opportunities were  
13 with Tom Petters?

14 A. They were with Tom Petters' company, yes.

15 Q. And this was the type of business development that you  
16 expected Chris Flynn to be doing?

17 A. Yes.

18 Q. Okay. If you could turn in the binder that we provided  
19 to you just recently, not that one that you used before, to  
20 tab P-277.

21 MR. LAWRENCE: And, Ms. Ellig, please don't  
22 display this. This is not yet admitted.

23 BY MR. LAWRENCE:

24 Q. Let me know when you are there.

25 A. Yes, I'm here.

1 Q. Do you recognize this document?

2 A. Yes. It's an e-mail exchange.

3 Q. Okay. And who is it an e-mail exchange involving?

4 A. It is involving myself and -- starting at the bottom  
5 here, myself, some of the team leaders that worked for me,  
6 and ends with an e-mail between Chris Flynn and myself.

7 MR. LAWRENCE: We offer P-277 into evidence.

8 MR. GLEESON: No objection.

9 THE COURT: Exhibit P-277 is received.

10 BY MR. LAWRENCE:

11 Q. So if we could start on -- let's start at the very  
12 bottom of page 2, and this is going to be the first e-mail  
13 in the chain at the very bottom. It looks like it is from  
14 Gigi Gilroy to you in June of 2008. Do you see that?

15 A. I do.

16 Q. And who is Gigi Gilroy?

17 A. She was my executive assistant.

18 Q. Okay. And she says, "Tom O'Neill is going to be in  
19 town," later that month, "June 24 and 25. Brad wants to  
20 know if Business Banking has a couple of customers that  
21 would be advantageous to have Tom to visit while he is  
22 here."

23 Tom O'Neill is the -- at the time he was the  
24 president of the bank?

25 A. No. Tom, he was a senior executive in the headquarters

Crain - Cross

1 for M&I.

2 Q. Someone important?

3 A. Yes.

4 Q. All right. And so the next e-mail up -- back onto  
5 page 2, it looks like you then forward this e-mail on to a  
6 handful of people, including Chris Flynn; fair?

7 A. Yes.

8 Q. And you say, "Please make your bankers aware of Tom's  
9 visit and let's line him up for a couple calls."

10 So then if you could turn to page 1, Chris Flynn  
11 responds to you and it looks like he suggests -- number one  
12 on his list is Petters, right?

13 A. Yes. He suggests three customers.

14 Q. And, finally, at the very top of the e-mail chain, "All  
15 good ideas."

16 So you were agreeing with Mr. Flynn's  
17 recommendation that it would be a good idea to set up a  
18 meeting between Petters and Tom O'Neill, right?

19 A. I would characterize it as I thought they were good  
20 ideas for us to consider who we ended up having Tom go  
21 visit.

22 Q. And included in that, it was a good idea for him to  
23 potentially go visit Tom Petters?

24 A. He was one of the many to be considered, yes.

25 Q. And, again, that's because you and Mr. Flynn saw the Tom

1 Petters relationship as a potential place to expand, to  
2 grow?

3 A. I'm sorry. I didn't hear the last word.

4 Q. "To grow."

5 A. To grow, yes.

6 Q. If you could go now to P-72, and I'm sorry to make you  
7 switch back and forth, but that is in your original binder.  
8 Or it might be in the one you have there as well. Are you  
9 with me?

10 A. It's in this binder, yes.

11 MR. LAWRENCE: And if you could, please, publish  
12 that, Ms. Ellig.

13 BY MR. LAWRENCE:

14 Q. And on direct you talked about the bottom paragraph of  
15 P-72 where, among other things, Ms. Moline was telling you  
16 that she had some reservations on the amount of work that  
17 would be involved in putting together the DACAs, right?

18 A. She had reservations about the amount of work it would  
19 be to administer them, would be my understanding.

20 Q. And did she also -- is it your understanding that she  
21 also had some reservations about the amount of attorney's  
22 fees that would be incurred in preparing them?

23 A. Not so much about the amount, but who would be paying  
24 for them.

25 Q. And you don't know one way or the other whether PCI

1 ended up paying those attorney's fees, right?

2 A. I don't know the outcome of that, no.

3 Q. So it could have been that the bank ended up paying it?

4 A. I don't know.

5 MR. GLEESON: Objection, speculation, Judge.

6 THE COURT: Sustained.

7 BY MR. LAWRENCE:

8 Q. And Ms. Moline adds that, "Chris feels there's potential  
9 for more business from Petters."

10 So among the reasons why it might be worth it to  
11 put in the amount of work necessary to put these DACAs  
12 together was that there might be more business with Petters  
13 down the road, right?

14 A. Yeah, I actually understand that in two perspectives.  
15 One is there was more business opportunities, and the more  
16 business opportunity we had was also another way to cover  
17 the costs associated with putting this in place.

18 Q. If you could turn to, in the original binder from this  
19 morning, DX-40248.

20 A. Okay. I have it.

21 Q. And we're going to --

22 MR. LAWRENCE: If we could publish that,  
23 Ms. Ellig, and look at the bottom of page 1.

24 BY MR. LAWRENCE:

25 Q. You testified about the 800 million per quarter that

1 would be running through the account, right?

2 A. Yes, I acknowledged that.

3 Q. Yeah. And even though 800 million was running through  
4 every quarter, most of that money was just passing through,  
5 it wasn't going to stay at the bank, right?

6 A. That is correct.

7 Q. Okay. And that didn't strike you as suspicious?

8 A. Based on the nature of the Petters enterprise and all  
9 the companies he had, I think it was reflective of the kind  
10 of business he was running.

11 Q. So it wasn't suspicious because that's what was expected  
12 of Petters?

13 A. It was -- yeah, he had quite a large business  
14 enterprise.

15 Q. But not all large business enterprises pass hundreds of  
16 millions of dollars through a checking account while  
17 maintaining a low balance, right?

18 A. No.

19 MR. GLEESON: Object to arguing with the witness.

20 THE COURT: Overruled.

21 THE WITNESS: No. Not all business enterprises,  
22 no.

23 BY MR. LAWRENCE:

24 Q. And do you agree that that's potentially a sign of money  
25 laundering?



Crain - Cross

1 A. No, I did not consider that at this time at all.

2 Q. Okay. And how would -- let me ask it a different way.  
3 For Ms. Moline to be telling you that 800 million was going  
4 to be passing through the account every quarter, that means  
5 that somebody at the bank was paying attention to how much  
6 money PCI was moving around, right?

7 MR. GLEESON: Objection to the form of the  
8 question.

9 THE COURT: Overruled.

10 THE WITNESS: The customer was indicating to us  
11 the kind of volume they would have going through the account  
12 and that was just something that, you know, they had shared  
13 with us, but also we learned that a lot of it -- a lot of  
14 that money wouldn't lead to a large account balance.

15 BY MR. LAWRENCE:

16 Q. That's something people at the bank knew?

17 A. Yes.

18 Q. Okay.

19 A. This is what they told us, what's in the e-mail, yes.

20 Q. And if you would jump to DX-40252, which you were asked  
21 about.

22 MR. LAWRENCE: And we can publish that.

23 BY MR. LAWRENCE:

24 Q. At the top, Mr. Flynn characterizes the amount of money  
25 that would stay in the account as nominal, right?

Crain - Cross

1 A. That's correct.

2 Q. So clearly Mr. Flynn was watching this as well?

3 A. Yes.

4 Q. Now if you could turn to 40251 -- and this was the draft  
5 DACA that we looked at -- and turn to page 2, paragraph(b)  
6 at the top -- or, I'm sorry, page 3.

7 A. Okay.

8 Q. And you remember talking about this transaction list?

9 A. I do.

10 Q. Okay. And at the end of the day the bank never received  
11 the transaction list, I think you said that?

12 A. Yes, that's my understanding.

13 Q. The agreement said that a transaction list was going to  
14 be provided weekly, right?

15 A. Potentially, yes.

16 Q. And you said that you were closely involved in this  
17 process?

18 A. I was involved in helping set up the Control Agreement,  
19 but not in the day-to-day administration of the account  
20 itself.

21 Q. So did anyone ever tell you that no transaction list was  
22 ever provided?

23 A. Not that I recall.

24 Q. Okay. And did anyone ever tell you at the time that  
25 the -- this DACA was being put together that there were no

retailer payments being placed into the PCI account at M&I?

A. We wouldn't have had that information.

Q. Well, you told me earlier that the bank has all of the transaction information for the PCI account, right?

A. The -- yeah, I mean, the operations department of the bank would have that information, correct.

Q. So if -- whether there were or were not retailer payments is something someone at the bank could look at?

A. I don't know that we would have had the detail to understand who those payments were coming from or not.

Q. Well --

A. I don't know the nature of those reports myself personally.

Q. So you just don't know one way or the other whether, for example, the information available to the bank would show who was wiring money into one of the bank's accounts?

A. A wire, yes. Yes.

Q. Okay. And so if there were no wires from retailers like Sam's Club or Costco, that would be within the knowledge of the bank?

A. Yes, the wire department would have that information.

Q. And so back to my original question. When you were putting these DACAs together, Mr. Flynn and nobody else told you that there were never any retailer payments that were supposed to be the subject of this agreement?

Crain - Cross

1 MR. GLEESON: Objection to the form of the  
2 question and to the foundation, Judge.

3 THE COURT: Overruled.

4 THE WITNESS: No. I mean, the agreement itself  
5 laid out the requirements for the transaction list. The  
6 transaction list would have identified that, but we didn't  
7 actually get a transaction list, is my understanding.

8 BY MR. LAWRENCE:

9 Q. My question was a little bit different, Ms. Crain.

10 A. Okay.

11 Q. It was whether Mr. Flynn or anybody else at the bank  
12 ever told you that there were never any retailer payments  
13 that were supposed to be the subject of the agreement.

14 A. No. I mean, I don't know that we had the information  
15 for them to share that. I'm sorry. I'm not exactly  
16 following the question. But, no, I personally didn't have a  
17 conversation with anyone in that regard.

18 Q. You said during your direct examination that Deposit  
19 Account Control Agreements are not common, right?

20 A. I did, yes.

21 Q. It would not be typical to enter into a DACA for a  
22 checking account at M&I Bank?

23 A. Not typical, no.

24 Q. Okay. And it was unique that the DACAs were being put  
25 into place for PCI at M&I Bank, right?

Crain - Cross

1 A. Yes, we were asked by the customer and, yes, it was  
2 unique to have that request.

3 Q. The reason that the bank was willing to engage in this  
4 atypical and unique step was as an accommodation for PCI,  
5 right?

6 A. Yes.

7 Q. This was, as you said before, one of the things the bank  
8 was doing to try to expand the relationship with PCI?

9 A. Yes.

10 Q. After these DACAs were put into place, though, you don't  
11 know one way or the other whether the bank put any policies  
12 or procedures in place in order to make sure that the bank  
13 performed its obligations under the DACAs?

14 A. We had -- Carolyn Moline's group had identified what the  
15 requirements were within the DACAs, and her group would have  
16 administered according to the agreement itself.

17 Q. But you don't know one way or the other whether any  
18 policies or procedures were put in place?

19 A. I believe there were procedures established, you know,  
20 by an understanding of Carolyn and her team. I don't know  
21 that there were any separate policies, no.

22 Q. So I just -- I want to make sure, first, that I  
23 understand your testimony.

24 You're saying that you believe there were  
25 procedures put in place, but not policies?

Crain - Cross

1 A. I'm sure there would have been a discussion by Carolyn  
2 and her team to make sure that they abided by the provisions  
3 within the agreement, yes.

4 Q. Can you please locate your deposition transcript and  
5 turn to page 97.

6 A. Sure.

7 Q. And beginning on line 19, were you asked this question  
8 and did you provide this answer:

9 "Question: Do you recall if M&I put any policies or  
10 procedures in place in order to perform its obligations  
11 under this agreement?

12 "Answer: No."

13 MR. GLEESON: Objection, that's not even remotely  
14 inconsistent.

15 THE COURT: Overruled.

16 THE WITNESS: That's how I answered the question  
17 specifically as stated.

18 So what you were just asking a moment ago, when I  
19 think about procedures and how to administer this account,  
20 I'm sure there were conversations. I'm very confident that  
21 would have been the case.

22 BY MR. LAWRENCE:

23 Q. Okay. My question was just were you asked that question  
24 and did you give that answer at the deposition?

25 A. Yes. Five years ago I did, yes.

1 Q. Five years ago was closer in time to these events than  
2 today; fair?

3 A. Pardon me?

4 Q. Five years ago was closer in time -- --

5 A. Oh, to the events --

6 Q. -- to 2007 and 2008 than today?

7 A. Yes.

8 Q. And between now and then, I think you said you met with  
9 the bank's lawyers? Sorry. Between then and now, you  
10 testified earlier that you --

11 MR. GLEESON: Objection. Can I approach, Judge?

12 THE COURT: You may.

13 **(At sidebar)**

14 THE COURT: So the question is?

15 MR. GLEESON: Between now and then you met with  
16 the bank's lawyers.

17 THE COURT: The objection?

18 MR. GLEESON: My objection is the question from  
19 the deposition passed in the night with her answer that she  
20 had discussions about the protocol. You overruled my  
21 objection. I got it.

22 Now he's suggesting that this is obviously -- she  
23 didn't testify that she met with the bank's lawyers. And  
24 now there's a suggestion that her testimony has changed  
25 because she met with the bank's lawyers.

Crain - Cross

1 But the testimony wasn't even inconsistent. This  
2 isn't fair. What's happening here is suggesting to the  
3 jury, based on nothing, something improper. And with  
4 respect, I don't think the Court should permit it.

5 MR. LAWRENCE: I think it goes to credibility if  
6 her testimony today is different than it was in her  
7 deposition after she conferred with the bank.

8 MR. GLEESON: If you read the allegedly  
9 inconsistent statement and the answer -- I know it was  
10 overruled; I'm not asking you to strike it -- there's no  
11 inconsistent statement.

12 And anyway, I think it's a pretty thin read to  
13 suggest that her testimony changed on this dimension after a  
14 meeting with the bank. And I think the suggestion is  
15 borderline -- I think it's inappropriate.

16 THE COURT: The objection is overruled.

17 **(In open court)**

18 COURT REPORTER: The server, the real-time server,  
19 went down for a second. Sorry.

20 (Pause)

21 THE COURT: Members of the Jury, you may take a  
22 stretch break, if you would like, at your seats.

23 COURT REPORTER: There we go. Is everybody good?

24 MS. MOMOH: Not yet.

25 THE COURT: Please let us know when you are ready.



Craig - Cross

1 You are --

2 MS. MOMOH: We can -- Your Honor, we can proceed,  
3 but my real-time is still not showing on my computer.

4 MR. LAWRENCE: May I proceed, Your Honor? I have  
5 been informed that apparently mine is the only one that  
6 works. So if we need to take a break for counsel, I'm happy  
7 to or I'll proceed if the Court wishes.

8 THE COURT: Well, let me ask: One party does not  
9 and one does; is that what I understand?

10 MR. COLLYARD: This one does not work either,  
11 Your Honor, but we're willing to move forward. It makes no  
12 difference to us.

13 MS. MOMOH: Okay. I guess we do have one on our  
14 side that is now working, so we can proceed, Your Honor.

15 MR. GLEESON: We're fine to go ahead, Judge.

16 THE LAW CLERK: Mine just booted back up too, if  
17 people want to try reconnecting.

18 THE COURT: Mine is fine. So it sounds like our  
19 technical difficulties have been resolved. Is that correct?

20 MS. MOMOH: Yes, Your Honor.

21 MR. COLLYARD: We're just fine, Your Honor, with  
22 moving forward.

23 THE COURT: Okay. Let's move forward.

24 MR. LAWRENCE: May I proceed?

25 THE COURT: Yes, you may.

Craig - Cross

1 BY MR. LAWRENCE:

2 Q. The question before our brief break was: Between your  
3 deposition and now, you've met with the bank's attorneys,  
4 right?

5 A. I have.

6 Q. So let's -- that actually reminds me for us to look at  
7 P-705.

8 MR. LAWRENCE: If we could publish that.

9 BY MR. LAWRENCE:

10 Q. And this was the document that you said that you'd had  
11 occasion to look at when you were preparing for your  
12 testimony today?

13 A. Yes.

14 Q. Right. So this wasn't something you saw when you worked  
15 at the bank or anything like that, it was shown to you for  
16 today's testimony?

17 A. That's correct.

18 Q. And I know we have -- you've testified that you don't  
19 think that these are really overdrafts, but they do show  
20 that there were insufficient funds in the PCI account at  
21 M&I Bank in amounts sometimes in excess of \$1 million on  
22 seven occasions, right?

23 A. Nonsufficient funds is how I would characterize those,  
24 which is a different definition than an overdraft.

25 Q. And whether or not it's called an overdraft or not, this

Crain - Cross

1 is something that would draw the attention of someone at the  
2 bank, right?

3 A. We would look at this to make sure that there were  
4 sufficient funds before we determined checks to clear the  
5 bank, yes.

6 Q. The bank would be concerned if one of its customers was  
7 repeatedly having nonsufficient funds for tens or hundreds  
8 of thousands of dollars, right?

9 A. The bank would be concerned if there were overdrafts of  
10 that amount, yes.

11 Q. But they wouldn't be concerned if they were simply, as  
12 you put it, nonsufficient funds that were later paid?

13 A. As long as there were deposits to cover the amounts,  
14 then there was a positive balance in the account as a  
15 result.

16 Q. Well, what if this type of thing was happening every  
17 day? Is that something that the bank would be fine with so  
18 long as the money was paid back within 24 hours?

19 MR. GLEESON: Objection, there's no foundation for  
20 that.

21 THE COURT: Sustained.

22 BY MR. LAWRENCE:

23 Q. Let's look at one of those ACE Reports. I think it's in  
24 your large binder. And the exhibit number -- give me one  
25 moment.

Crain - Cross

1 (Pause)

2 Q. I believe the exhibit you looked at before was DX  
3 [inaudible].

4 THE COURT REPORTER: Can you give me that number  
5 again, please?

6 MR. LAWRENCE: DX-40308.

7 BY MR. LAWRENCE:

8 Q. And if we look at page 2, this is the June 2008 ACE  
9 Report that you testified about on direct?

10 A. Yes, it is.

11 Q. And I think we saw on direct that Petters Co., Inc.  
12 is -- it's three lines up from the bottom on page 2, right?

13 A. Actually on page 1.

14 Q. Sorry. We're crossing wires. When I'm saying page 2,  
15 I'm referring in sort of the middle bottom it says DX-40308  
16 dash --

17 A. Oh, I see that, yes.

18 Q. And PCI was -- it's at the bottom of that page, right?

19 A. That's correct.

20 Q. And you said that this is ranking the bank's customers  
21 according to their profitability over the preceding  
22 12 months, right?

23 A. Not the bank's customers. Just for the business banking  
24 group.

25 Q. For the Minnesota region?

1 A. Yes.

2 Q. And if you look down in the bottom, it says that this is  
3 page -- now we're going to use your page numbers -- 1 of 42?

4 A. Yes.

5 Q. Okay. So -- and you can page through here.

6 MR. LAWRENCE: And, Ms. Ellig, if you could just  
7 page forward to the next couple pages of the document.

8 BY MR. LAWRENCE:

9 Q. The following pages in this document all look similar to  
10 page 1, right?

11 A. Yes, they do.

12 Q. Okay. And let's go back to -- let's just stay in one  
13 place, so let's go back to Bates number 2 of this document,  
14 where PCI was.

15 There's, what, 50 customers on the first page?

16 A. Yeah, I would guess that's about right.

17 Q. Okay. And so if there's 50 customers on -- let's round  
18 down -- 40 pages, to make the math easy, that's 2,000  
19 customers listed?

20 A. I don't know how many pages are in here, so...

21 Q. Well, it says --

22 A. I'll rely on your math.

23 Q. -- this is page 1 of 42, right?

24 A. Oh, yes. Okay.

25 Q. So if there's 50 customers on each page and there's

Crain - Cross

1 42 pages, there's over 2,000 customers listed, right?

2 A. Yes, that's correct.

3 Q. And let's actually -- let's go to page-0042 just  
4 briefly. All of the customers on this page, their net  
5 profit in the "R12" column, it's in red text, right?

6 A. Yes, it is.

7 Q. And that means that they were unprofitable, they had a  
8 negative net profit?

9 A. Yes.

10 Q. So this document has 2,000 customers ranging from the  
11 ones that are most profitable to the bank all the way down  
12 to the least profitable ones, meaning they were actually  
13 costing the bank money in that time period, right?

14 A. I would -- again, I wouldn't characterize it as the  
15 bank. It's for the business banking group within the  
16 Minnesota region.

17 Q. Thank you for that correction.

18 And PCI, that's on page 1, right?

19 A. Yes.

20 Q. So of the over 2,000 customers listed here in the  
21 Minnesota region for business banking, PCI is still in the  
22 top, for this month, top 50, right?

23 A. Yes, it is.

24 Q. And this document, as we saw before, this isn't just,  
25 for example, Chris Flynn's customers, this is everybody

1 within the region's customers?

2 A. For business banking, yes.

3 Q. So for Chris Flynn, in this month PCI might not have  
4 been his top customer, but it was one of his top customers?

5 A. For Chris it was, yes.

6 Q. You can set that aside.

7 So let's talk a little bit about business banking.  
8 You said that at the time that you worked at M&I, the  
9 business banking group was separate from the commercial  
10 banking group, right?

11 A. Yes, it was.

12 Q. And I think you said that the difference was that  
13 generally business banking handled customers with revenues  
14 below \$25 million a year?

15 A. That's correct, generally, yes.

16 Q. And just to make sure we're all on the same page, when I  
17 say "revenues below 25 million," we're not talking about the  
18 revenue the bank earns from the customer, but that's the  
19 customer's revenue, what they earn in their business?

20 A. That's correct.

21 Q. Okay. But PCI, with its billions of dollars in and out  
22 of this account, it was in the business banking group,  
23 right?

24 MR. GLEESON: Object to the form of the question.

25 THE COURT: Overruled.

Crain - Cross

1 THE WITNESS: Yes, it was in the business banking  
2 account -- or in the business banking group.

3 BY MR. LAWRENCE:

4 Q. And you said that the bank had no small business banking  
5 group. It was business banking, right?

6 A. Correct.

7 Q. And so I'd like to turn our attention to Exhibit P-2.  
8 It's an admitted exhibit. And, unfortunately, I don't  
9 believe it's in your binder, so we're going to put it up on  
10 the screen. And if you feel that you need to see anything  
11 else, let me know. Okay?

12 A. Okay.

13 Q. And I want to draw your attention specifically to  
14 P-2-36. And do you see that this is a MIContacts entry that  
15 looks like it's the report of a call involving Shari Rhode,  
16 Edward Jambor, and Steve Berglund?

17 A. Yes, I see that.

18 Q. And if we turn, then, to P-35, I want to draw your  
19 attention to the second sentence. It says, "Because they  
20 have only been a deposit customer, they have remained on the  
21 small business banking side. However, as they consolidate,  
22 they want some lines of credit and now will need the  
23 expertise of the commercial side." Do you see that?

24 A. Yes.

25 Q. Okay. And now if you could turn to --



Crain - Cross

1 MR. LAWRENCE: Ms. Ellig, if you can put up  
2 page 39 of this document.

3 BY MR. LAWRENCE:

4 Q. And you see this is another PCI MIContacts entry?

5 A. Yes.

6 Q. And then on page 38, because it's weird and the page  
7 before is actually what comes after, do you see that the  
8 last sentence says, "This is now too large for small  
9 business and Ed will transition to Chris Flynn"?

10 A. Yes, I see that.

11 Q. Okay. So the bank's employees, at least, they refer to  
12 the business banking group as the small business banking  
13 group sometimes, right?

14 A. This was in 2003 prior to my time at M&I, so I don't  
15 know what the organization looked like prior to my joining.

16 Q. But at least in that period of time it looks like they  
17 refer to it as "small business"?

18 A. I'm -- you know, the language is what they used, yes. I  
19 don't know about departments. I just wasn't there at that  
20 time.

21 Q. Are you aware of any other account during your time at  
22 M&I that was located in the business banking group of the  
23 bank that had billions of dollars going in and out of the  
24 account on a regular basis?

25 A. I don't have that information. I'm not aware of it, no.

Crain - Redirect

1 MR. LAWRENCE: May I have just one moment,  
2 Your Honor?

3 THE COURT: You may.

4 (Plaintiff's counsel confer)

5 MR. LAWRENCE: Nothing further, Your Honor.

6 Thank you, Ms. Crain. I appreciate it.

7 THE WITNESS: Thank you.

8 MR. GLEESON: May I pose a few questions to the  
9 witness on redirect?

10 THE COURT: You may.

11 MR. GLEESON: Thank you, Judge.

12 If you could pull up 40251, please, Mr. Herzka,  
13 and go to the second page of it, 2(b). It might be the  
14 third page. There you go. Thank you.

15 **REDIRECT EXAMINATION**

16 BY MR. GLEESON:

17 Q. You were asked about this --

18 A. Yes.

19 Q. -- on cross-examination. Do you recall that?

20 A. I do.

21 Q. Okay. It says -- you were asked about whether there was  
22 a requirement that a transaction list be provided weekly.  
23 Do you recall that questioning?

24 A. Yes.

25 Q. It says, "Petters shall provide to each Protected Party

1 and M&I at least once each week (or more if necessary to  
2 enable M&I to discharge its obligations hereunder) a list of  
3 all Transactions funded by a Protected Party with respect to  
4 which payment may be received by M&I for deposit into the  
5 Deposit Account." Do see that?

6 A. Yes.

7 Q. If a payment was not received, would a transaction list  
8 be provided?

9 A. No.

10 Q. The -- you said these agreements were uncommon, correct?

11 A. Yes.

12 Q. Okay. And this was one certainly unique to the  
13 relationship with PCI, you didn't do these with your -- your  
14 bank didn't do it with PCI before, correct?

15 MR. LAWRENCE: Objection, leading.

16 THE COURT: Sustained.

17 BY MR. GLEESON:

18 Q. Had you engaged in any of these with PCI before?

19 A. I had not personally, no.

20 Q. Was there anything, to your mind, at the time suspicious  
21 about this transaction?

22 A. No.

23 Q. You were asked whether it was an accommodation to  
24 Petters, to PCI, right?

25 A. Yes.

1 Q. It was?

2 A. Yes.

3 Q. Is it an accommodation you would have provided to any  
4 customer in the business banking group who asked for it?

5 MR. LAWRENCE: Objection, leading.

6 THE COURT: Overruled.

7 THE WITNESS: Yes, absolutely, we would have  
8 considered it.

9 BY MR. GLEESON:

10 Q. Okay. You saw Petters and PCI as a business  
11 opportunity, correct?

12 A. Yes.

13 Q. Did you see all of the customers in the business banking  
14 group that you managed as business opportunities?

15 A. Generally, yes.

16 Q. Okay. In this regard, Petters as a business  
17 opportunity, did you treat PCI or Petters any differently  
18 than you treated any of the other customers at the bank?

19 A. No.

20 Q. In any respect was the PCI account treated any  
21 differently than any of the other customers?

22 MR. LAWRENCE: Objection, foundation.

23 THE COURT: Overruled.

24 THE WITNESS: No.

25 BY MR. GLEESON:

1 Q. You were asked about Mr. Laumann and Mr. Wehmhoff and  
2 Mr. Salmen, whose names appeared on a MIContact report.

3 A. Yes.

4 Q. Do you remember that?

5 A. Yes.

6 MR. GLEESON: Mr. Herzka, could you pull up  
7 Defendant's 40296.

8 BY MR. GLEESON:

9 Q. And you were asked about whether they were PCI  
10 employees. Do you recall that testimony?

11 A. I do.

12 Q. Okay. If you could focus on the PCI account. And let's  
13 reorient ourselves to this. What date is it?

14 MR. GLEESON: If you could focus on that.

15 THE WITNESS: This is April of 2008.

16 BY MR. GLEESON:

17 Q. And this is Chris Flynn's ACE Report for that month,  
18 correct?

19 A. That is correct.

20 Q. Okay. And let's go down to Petters. On the left side,  
21 the Petters accounts fall under what heading?

22 A. "Petters Company, Inc."

23 Q. Okay. And were all of those accounts that you see there  
24 part of the Petters Company, Inc. account at PCI -- at M&I  
25 Bank?

1 A. Yes, we rolled them all up to be part of the PCI  
2 relationship.

3 Q. So they were all part of the relationship, correct?

4 A. That's correct.

5 Q. So people who worked in connection with Petters Capital  
6 or Petters Company, LLC, and the like would be part of that  
7 account, correct?

8 A. That's correct.

9 Q. Okay. And you were asked questions about whether there  
10 were any other business enterprises that had the kind of  
11 volume of transactions with M&I analogous to that that the  
12 PCI account had. Do you recall that?

13 A. Yes.

14 Q. Okay. Did you have other accounts that had the kind of  
15 business enterprise that Tom Petters had?

16 A. Not that I recall. Certainly not in business banking.

17 Q. Yeah. Did those -- would a typical business banking  
18 customer also own Fingerhut and Sun Country Airlines?

19 A. No, they did not.

20 Q. Did you regard the amounts coming through the deposit  
21 account as suspicious and remarkable?

22 A. Not for the nature of the business that Petters Company,  
23 Inc. overall was, no.

24 Q. And, lastly, did it ever come to your attention -- and  
25 I'm limiting my question to things that you were told or

1 observed --

2 A. Okay.

3 Q. -- in the workplace at M&I Bank. Okay?

4 A. Okay.

5 Q. Did it ever come to your attention in any way that  
6 anybody at M&I Bank even remotely suspected that PCI was a  
7 Ponzi scheme?

8 A. No.

9 MR. GLEESON: Thank you, Judge. I have nothing  
10 further.

11 THE COURT: Anything further for this witness?

12 MR. LAWRENCE: Yes, Your Honor.

13 **RECROSS-EXAMINATION**

14 BY MR. LAWRENCE:

15 Q. Did you know that PCI, Petters Company, Inc., is not the  
16 company that owned Sun Country?

17 A. I don't have the knowledge of which entity owned which  
18 entity, no.

19 Q. Okay. And it's not the company that owned Fingerhut?

20 A. I don't have knowledge of the -- kind of the rollup of  
21 the holding companies, no.

22 Q. Okay. So assuming that PCI is not the company that  
23 owned Sun Country or Fingerhut, those businesses would not  
24 explain the billions of dollars that was going in and out of  
25 the PCI account, right?

Crain - Reccross

1 MR. GLEESON: Objection.

2 THE COURT: Overruled.

3 THE WITNESS: I have -- I don't know the makeup of  
4 PCI to understand whether or not that would have been, you  
5 know, taking in those transactions or not from those  
6 entities. So I don't have knowledge of it enough to answer  
7 that question definitively.

8 BY MR. LAWRENCE:

9 Q. My question was that if PCI didn't own Sun Country or  
10 Fingerhut, then those businesses aren't the reason why  
11 billions of dollars was going in and out of the PCI account,  
12 right?

13 MR. GLEESON: Objection, this is argument.

14 THE COURT: Overruled. You may answer if you can.

15 THE WITNESS: I don't know what made up the PCI  
16 ownership structure, what -- if that was a holding company.  
17 So I don't know what entities it owned to be able to answer  
18 that question.

19 BY MR. LAWRENCE:

20 Q. Right. And I understand that and that's why I'm asking  
21 you to assume, since you don't know, that PCI did not own  
22 Sun Country or Fingerhut and that that was another aspect of  
23 the Petters enterprise. Assuming --

24 MR. GLEESON: Objection. Sorry. I thought you  
25 were done.



Cain - Further Redirect

1 BY MR. LAWRENCE:

2 Q. Assuming that is true, the billions of dollars going in  
3 and out of the PCI account is not explained by the fact that  
4 Petters separately owned Sun Country and Fingerhut, right?

5 MR. GLEESON: Objection to the form of the  
6 question, to the facts asserted in it. Objection.

7 THE COURT: Sustained.

8 MR. LAWRENCE: Nothing further.

9 MR. GLEESON: I have two questions, Judge, if I  
10 may?

11 **FURTHER REDIRECT EXAMINATION**

12 BY MR. GLEESON:

13 Q. This was a deposit account that PCI had at M&I Bank?

14 A. That's correct.

15 Q. Was there anything. Anything at all that prohibited  
16 Petters or a Petters-related company to make deposits into  
17 that account?

18 A. No.

19 MR. GLEESON: I have nothing further. Thank you.

20 THE COURT: Anything further for this witness?

21 MR. LAWRENCE: Nothing further from us,  
22 Your Honor. Thank you.

23 THE COURT: May the witness be excused?

24 MR. GLEESON: Yes.

25 THE COURT: You're excused.

Vanderheyden - Direct

1 MR. SCHAPER: Your Honor, defendant's next witness  
2 is Mr. John Vanderheyden.

3 THE COURT REPORTER: Are you Mr. Schaper?

4 MR. SCHAPER: Yes. Thank you.

5 THE COURT: And has the witness stand been cleared  
6 off?

7 MR. SCHAPER: We're working on it. Thank you.

8 (Pause)

9 THE COURT REPORTER: Come up and raise your right  
10 hand. I'll swear you in.

11 (Witness sworn)

12 THE COURT REPORTER: Go ahead and have a seat in  
13 the witness stand, please, and pull that microphone right up  
14 to you and state your full name.

15 THE WITNESS: John Vanderheyden.

16 THE COURT REPORTER: And spell your name, please.

17 THE WITNESS: V-a-n-d-e-r-h-e-y-d-e-n.

18 THE COURT: Counsel, you may proceed.

19 MR. SCHAPER: Thank you, Your Honor.

20 **(JOHN VANDERHEYDEN)**

21 **DIRECT EXAMINATION**

22 BY MR. SCHAPER:

23 Q. Good afternoon, Mr. Vanderheyden.

24 A. Good afternoon.

25 Q. Mr. Vanderheyden, where are you from?

Vanderheyden - Direct

1 A. I am from the Milwaukee area; Racine, Wisconsin.

2 Q. You said "Racine, Wisconsin"?

3 A. Yes.

4 Q. How long have you lived there?

5 A. All my life.

6 Q. Did you attend college, Mr. Vanderheyden?

7 A. I did.

8 Q. Where did you go to college?

9 A. I went to undergrad school at the University of  
10 Wisconsin-Eau Claire, and then I subsequently went to  
11 graduate school and got a master's degree at the University  
12 of Wisconsin-Parkside in Kenosha, Wisconsin.

13 Q. What was your undergraduate degree in, Mr. --

14 A. Management information systems and economics.

15 Q. And what about your graduate degree?

16 A. Accounting and finance.

17 Q. Mr. Vanderheyden, do you understand that you are here to  
18 testify about a project at M&I's IT department to  
19 consolidate some e-mail servers?

20 A. Yes.

21 Q. How long have you worked in the IT field?

22 A. A bit over 40 years.

23 Q. And what made you get into that line of work?

24 A. When I started in college in the MIS degree, I got on to  
25 something that I enjoyed and I continued down that road my

Vanderheyden - Direct

1 entire career.

2 Q. Were you employed by M&I and BMO Harris at some point?

3 A. I was.

4 Q. And what role did you play at M&I and BMO Harris?

5 A. Senior vice president of information technology services  
6 with M&I Bank, and the role was defined as technology head  
7 with BMO.

8 Q. When did you begin working at M&I, Mr. Vanderheyden?

9 A. December of 2000.

10 Q. And just generally can you describe for the jury what  
11 your role at M&I entailed.

12 A. My role was to lead a group that basically ran the  
13 operations of the M&I internal applications and services,  
14 things that included the IT help desk, desktop services,  
15 data center services, the wide area network for voice and  
16 data. And that pretty much covers it.

17 Q. And were you promoted to senior vice president of  
18 technology services at some point?

19 A. Yes.

20 Q. Do you recall roughly when that was?

21 A. Maybe 2007 time frame.

22 Q. And did you leave BMO Harris at some point?

23 A. I did.

24 Q. When was that?

25 A. January of 2015.

1 Q. Okay. Thank you.

2 Let's talk for a few minutes about how e-mail  
3 storage worked at M&I. In the 2009-2010 time period, was  
4 there a system at M&I to capture e-mail communications?

5 A. Yes.

6 Q. What was the name of that system?

7 A. The name was Legato.

8 Q. And when was the Legato system first implemented at M&I?

9 A. It was fully implemented in March 2005.

10 Q. And was there a reason that M&I implemented the Legato  
11 system?

12 A. Yes. The Legato system -- the reason for the Legato  
13 system started from a SEC or a Securities and Exchange  
14 Commission ruling requirement that all broker-dealer  
15 communications be held for six years.

16 Q. And am I right that there were individuals employed at  
17 M&I Bank that were broker-dealers?

18 A. That is correct.

19 Q. About how many broker-dealers were there at M&I Bank at  
20 the time you implemented this Legato system?

21 A. The number, I don't know the exact, but it was somewhere  
22 between 50 and 200.

23 Q. And just generally speaking or roughly speaking, about  
24 how many employees did M&I have at the time?

25 A. 10,000.

Vanderheyden - Direct

1 Q. So did M&I implement this Legato system only for the  
2 broker employee -- the broker-dealer employees?

3 A. No.

4 Q. Can you tell me --

5 A. Yeah.

6 Q. -- what it covered.

7 A. We did it for the entire population of the full 10,000  
8 users, even though that requirement was only for less than  
9 1 percent of that total population.

10 Q. And prior to the SEC rule that you mentioned, was there  
11 any requirement you were aware of for M&I to store copies of  
12 all employee e-mails?

13 A. No.

14 Q. Mr. Vanderheyden, could you explain to the jury how  
15 Legato worked in terms of storing e-mails.

16 A. Legato was a software tool that sat on all of the e-mail  
17 servers. It would capture a copy of every e-mail sent and  
18 received and place it on a specialized disk array called EMC  
19 Centera that was certified nonalterable.

20 Q. So let me ask you a few questions about that --

21 A. Sure.

22 Q. -- to make sure I understand some of that.

23 First of all, sometimes when we send e-mails, they  
24 include attachments, like attaching a Word file or something  
25 like that. Did Legato capture attachments to e-mails?

Vanderheyden - Direct

1 A. It did.

2 Q. And so did the Legato system -- am I understanding your  
3 testimony that it captured every e-mail and attachment that  
4 an M&I employee sent or received from March 2005 forward?

5 A. That's correct.

6 Q. Well, what about if an employee on their own computer  
7 deleted an e-mail, would that still be found in the Legato  
8 system?

9 A. Yes, it would because it was captured at the point in  
10 time where that person received an e-mail or sent it and  
11 then deleted it.

12 Q. So you mentioned -- you used the word "unalterable" --

13 A. Correct.

14 Q. -- when you were describing the Legato system. Can you  
15 just explain what you meant by "unalterable."

16 A. That it was impossible for us technicians, so to speak,  
17 to alter anything on that disk or to delete anything from  
18 that disk.

19 Q. And to the best of your knowledge, Mr. Vanderheyden, how  
20 long did M&I save the e-mails that were retained in Legato?

21 A. Forever.

22 Q. So, to sum up, Legato permanently stored all e-mails and  
23 attachments that were sent and received at M&I after the  
24 Legato system was implemented in March 2005. Am I  
25 understanding your testimony correctly?

Vanderheyden - Direct

1 A. That's absolutely correct.

2 MR. COLLYARD: Objection, leading.

3 THE COURT: Overruled.

4 THE COURT REPORTER: I'm sorry. Who objected?

5 MR. COLLYARD: Mike Collyard.

6 THE COURT: Overruled.

7 BY MR. SCHAPER:

8 Q. What was your answer, Mr. Vanderheyden?

9 A. Correct.

10 Q. And you said that M&I put this system in place for all  
11 10,000 or so of its employees even though the federal  
12 regulations you mentioned only required it for a very small  
13 subset of these employees. Is that your testimony?

14 A. That's correct.

15 Q. Before the Legato system, before March 2005 -- did  
16 Legato store the copies of e-mails that were sent prior to  
17 March 2005?

18 A. No.

19 Q. And just why is that?

20 A. It was a go-forward implementation from March 2005  
21 forward.

22 Q. Were there other ways that e-mails that were sent or  
23 received before March 2005 were stored?

24 A. They were stored on the e-mail server itself and they  
25 were captured in the backups of that -- those e-mail



1 servers.

2 Q. Okay. And when you mention "backups," is that a  
3 reference to backup tapes?

4 A. That is.

5 Q. And can you explain what you mean by that.

6 A. Backup tapes -- tapes are no longer in vogue today.  
7 However, it was a way to back up everything on that server,  
8 meaning take a copy, generally run every day and run during  
9 the evening hours, 2:00 a.m., 3:00 a.m. in the morning.

10 Q. How frequently were backup tapes created at M&I?

11 A. They were done daily.

12 Q. And were there also monthly and yearly backup tapes  
13 created?

14 A. That's correct.

15 Q. Can you just explain that a bit.

16 A. So the dailies were kept for 30, 31 days. The last day  
17 of the month was kept and taken, let's call it, out of  
18 rotation so it couldn't be reused for a period of three  
19 years. And the end-of-year tape was also taken, then, out  
20 of rotation and kept for seven years.

21 Q. And what happened to the backup tapes after their time  
22 in the rotation was up?

23 A. I'm sorry. What do you mean by that?

24 Q. So what happened to the backup tapes after their -- say  
25 the daily backup tape after it had been 30 days, then what

Vanderheyden - Direct

1 happens to that tape?

2 A. Then it would be reused.

3 Q. From time to time, Mr. Vanderheyden, did you have  
4 occasion to assist M&I's legal department with implementing  
5 legal holds?

6 A. I did.

7 Q. And just generally speaking, what was a legal hold?

8 A. A legal hold was a notice to a set of people that they  
9 should no -- they can no longer destroy any documents --

10 Q. Okay.

11 A. -- either paper or electronic.

12 Q. And prior to 2010 -- if a legal hold required the  
13 preservation of employee e-mails in this 2010 time frame,  
14 how would M&I go about preserving those e-mails?

15 A. We would get them from Legato, that e-mail archive.

16 Q. Before Legato was implemented, how, if you needed them,  
17 would you get employee e-mails?

18 A. Just to pick them off the server as they sat. It would  
19 have -- it never came up, actually, prior to that.

20 Q. Prior to the implementation of Legato --

21 A. No.

22 Q. -- did you ever go to e-mail backup tapes to retrieve  
23 e-mails from employees?

24 A. Never did.

25 MR. SCHAPER: Your Honor, I'm about to start a new

1 topic. Would you like me to keep going?

2 THE COURT: No, I would not. Thank you for  
3 letting me know that.

4 Members of the Jury, we are ready to take our  
5 break for the day.

6 You must not discuss this case with anyone,  
7 including other jurors, members of your family, or people  
8 involved in the trial or anyone else. And don't allow  
9 anyone to discuss the case with you or within your hearing.

10 And when I say do not -- you must not discuss this  
11 case with anyone, I also mean do not e-mail, send text  
12 messages, blog, or engage in any other form of written,  
13 oral, or electronic communication as I've instructed you  
14 before.

15 Also, do not read any newspaper or any written  
16 account, watch any televised account, or listen to any radio  
17 program about the trial. And do not conduct any internet  
18 research or consult with any other resources about the case,  
19 about the people involved in the case, or about the subject  
20 matter of the case.

21 As you know, you must keep an open mind and that's  
22 free from outside information. And, as you know, it would  
23 be a violation of your oath to base your decision on  
24 information that you received or acquired outside of the  
25 courtroom.

1           So we will plan to gather again for your service  
2           at the same time tomorrow. All rise. Thank you.

3           A JUROR: What time?

4           THE COURT: 9:00 we will begin.

5                           **IN OPEN COURT**

6                           **(JURY NOT PRESENT)**

7           THE COURT: Sir, you are excused from testifying  
8           today. Please be prepared to come back tomorrow to continue  
9           your testimony. Okay. Thank you.

10                   Is there anything else that needs to be addressed  
11           with the Court?

12           MR. SCHAPER: Your Honor, did I hear you say that  
13           we're starting at 9:00 a.m. tomorrow?

14           THE COURT: I think you did hear me say that,  
15           9:00 a.m.

16           MR. SCHAPER: That's correct. Thank you.

17           THE COURT: Anything else?

18           MR. COLLYARD: Yes, Your Honor, plaintiff has one  
19           issue. If I can just --

20           THE COURT: You may be seated.

21           MR. COLLYARD: If I can just be heard briefly,  
22           Your Honor, I think this is relevant to the testimony we're  
23           about to hear from Mr. Vanderheyden. It goes to your ruling  
24           earlier this morning.

25                   I thought I'd raise it now instead of having to do

1       it on sidebar and waste the jury's time. So if you're okay  
2       with it, I'd just like to present to you the issue that  
3       we're about to see.

4               THE COURT: You may.

5               MR. COLLYARD: So this morning there was an issue  
6       as to whether or not plaintiff can use certain interrogatory  
7       responses in questioning Mr. Vanderheyden.

8               And this exhibit that I have is Plaintiff's  
9       Exhibit 149, which was actually disclosed on the defendant's  
10      exhibit list to us, and it's an interrogatory response that  
11      is signed or verified by Mr. Vanderheyden back in 2014.

12              And what this interrogatory response does is it  
13      goes through this server consolidation project that  
14      Mr. Schaper just kind of highlighted with Mr. Vanderheyden  
15      was going to be the subject of his testimony.

16              And, Your Honor, what is happening here is what  
17      the defendants are doing is they are precluding me from  
18      using the exact evidence that Mr. Vanderheyden verifies  
19      about the consolidation project.

20              And they are going to have him talk about that  
21      consolidation project, but I'm not going to be allowed to  
22      ask him certain questions or get to certain information  
23      because they are going to say it goes to the implication of  
24      counsel conduct. What Mr. Vanderheyden then is now going to  
25      testify to is this entire project that I'm not going to be

1 allowed to probe because they are saying it goes to counsel  
2 conduct.

3 And so if I'm not allowed to ask questions of  
4 Mr. Vanderheyden based on this project and based on his  
5 verification in an interrogatory, which is an admission of a  
6 party-opponent, they should not be allowed to question  
7 Mr. Vanderheyden on this consolidation project that would go  
8 to the destruction of the backup tapes in 2010 or 2011  
9 either. And that's the issue that we're now going to have.

10 So I would request to the Court that  
11 Mr. Vanderheyden not be allowed to testify to anything about  
12 a consolidation project pertaining to the destruction of  
13 backup tapes in 2010 or 2011 as a result of the defendants  
14 themselves precluding me from using any evidence whatsoever  
15 about this, including the very interrogatories that  
16 Mr. Vanderheyden himself signed.

17 MR. SCHAPER: Your Honor, I'll just be brief on  
18 this issue that I believe you ruled on less than 12 hours  
19 ago.

20 First of all, this was on defendant's list because  
21 it was before the Court had ruled to exclude counsel  
22 conduct. But clearly preparation of interrogatories is  
23 bound up with counsel conduct, which I suspect is part of  
24 the reason for the Court's ruling this morning.

25 Of course counsel can ask about the facts

1 underlying the -- what was in the response to the  
2 interrogatories. And, also, I think if there is  
3 inconsistent testimony, they could be used for impeachment  
4 purposes.

5 But I think the Court has properly ruled already  
6 that the interrogatories -- and I'm not going to do it  
7 either -- the interrogatories cannot preemptively be used as  
8 a basis to question the witness.

9 The witness can be questioned about the facts  
10 within interrogatory responses or any other facts, for that  
11 matter, if they are relevant, but showing the jury a court  
12 document is obviously -- obviously, lawyers were involved in  
13 the preparation of that. Lawyers signed it also, as is the  
14 case with interrogatories.

15 So that's why that brings into the conduct of  
16 counsel that the Court has excluded, and the Court has  
17 already sustained defendant's objection to the use of these  
18 interrogatories as evidence.

19 MR. COLLYARD: According to defendants,  
20 Your Honor, all of the conduct of defense counsel is  
21 implicated in this entire project based on what they just  
22 argued and I would be precluded -- there's no way that I can  
23 go through and elicit facts that are in an interrogatory  
24 response properly without showing him the interrogatories.

25 And there's also an issue, too, where

1 Mr. Vanderheyden was involved in finding tapes back --  
2 finding six backup tapes in 2014. And they were destroyed.  
3 And the date of that e-mail that he's on is dated August 26.  
4 These interrogatories are dated three days later. And it  
5 goes to whether or not Mr. Vanderheyden is being truthful or  
6 not in this verification.

7 THE COURT: Okay.

8 MR. SCHAPER: Your Honor, may I respond briefly?

9 (Pause)

10 MR. SCHAPER: May I respond briefly, Your Honor?

11 THE COURT: Yes.

12 MR. SCHAPER: There is no counsel conduct involved  
13 in the 2010 server consolidation project that will be a  
14 chunk of my testimony with Mr. Vanderheyden. Counsel was  
15 not involved in that. And that has nothing to do -- the  
16 interrogatory responses that plaintiff's counsel is talking  
17 about were prepared in 2014.

18 Plaintiff's counsel has already gotten into  
19 evidence and the Court has allowed over our objection one  
20 e-mail that was between Mr. Vanderheyden and counsel. So  
21 that's in evidence. We will deal with that. But these  
22 interrogatory answers themselves, we are not going to  
23 address those.

24 And, again, the server consolidation project that  
25 is the root of this document retention issue in this case



1 happened in 2010. We're going to elicit testimony about  
2 what the nature of that project was, why it was undertaken  
3 by the M&I IT department. We'll actually elicit testimony  
4 that counsel was not involved in it. It's really the  
5 opposite of what plaintiff's counsel is saying.

6 THE COURT: You said that counsel was not  
7 involved?

8 MR. SCHAPER: Was not involved in it, yeah. It's  
9 an IT project. I think the Court probably has a sense from  
10 Mr. Vanderheyden already that he is an IT person through and  
11 through. And it was -- this was an IT project, as the Court  
12 will see first thing tomorrow morning. So that does not  
13 implicate counsel conduct at all.

14 And as I said, plaintiff, just as defendant can  
15 do, can ask the witness about underlying facts. If they  
16 believe something is inconsistent in terms of the testimony  
17 as to those underlying facts with something that was stated  
18 in an interrogatory, then they can -- if it's appropriate or  
19 proper impeachment, they can use that for that narrow  
20 purpose.

21 But as the Court ruled this morning, those  
22 interrogatory responses in general should not be admitted as  
23 exhibits for this witness or otherwise.

24 MR. COLLYARD: Sorry, Your Honor. I'll be brief.  
25 That is simply not true. And I'll just tell you that the

1       interrogatory starts out by asking what the interrogatory  
2       is. And their own answer starts saying as early as  
3       June 2009 John Vanderheyden, the signature below, began  
4       plans to consolidate server hardware, and it goes on to  
5       explain it. And it says in these interrogatory responses  
6       that Minnesota regional e-mail backup tapes were collected  
7       and destroyed in the time period of October 2010 and 2011.

8               That is what these interrogatory responses talk  
9       about. Those were the basic facts that I had asked them to  
10      stipulate to that they would not stipulate to, for example,  
11      when we proposed those findings to you.

12             So we have been at a disadvantage all because they  
13      keep using this argument that it implicates the conduct of  
14      counsel. And what Mr. Schaper just said is nothing in these  
15      interrogatories contemplates the conduct of counsel. But  
16      they argued to you this morning that that was the basis of  
17      excluding this very thing.

18             And so if they are going to say that that is the  
19      basis of excluding information about the server  
20      consolidation project, then Mr. Vanderheyden should not be  
21      allowed to testify at all about the consolidation project,  
22      if that's what they have argued to this Court.

23             And if they are changing their mind and doing a  
24      redo, then I should be able to use the interrogatory  
25      responses that go to this that are the admissions of a

1 party-opponent that I can elicit testimony from  
2 Mr. Vanderheyden on.

3 MR. SCHAPER: Very briefly, Your Honor.

4 The fact that the interrogatories in 2014 refer to  
5 events five years earlier, they don't refer to them as  
6 saying counsel was involved. The bank was asked questions  
7 in 2014 about what happened with this server consolidation  
8 project, so they had to respond. But the responses -- and  
9 plaintiff didn't indicate otherwise.

10 THE COURT: Who responded?

11 MR. SCHAPER: The bank did.

12 THE COURT: Okay.

13 MR. SCHAPER: And Mr. Vanderheyden verified those  
14 bank responses in 2014. But the description of what  
15 happened in '09 and '10, which is what Mr. Vanderheyden will  
16 be testifying about principally, did not involve counsel nor  
17 do the interrogatory responses say that counsel was  
18 involved.

19 THE COURT: And you said "principally." What else  
20 will he be testifying about?

21 MR. SCHAPER: So he also will be testifying about  
22 the fact that in 2014 there was a search for backup tapes.  
23 That was the subject of Mr. Scherer's deposition testimony  
24 that was played for the Court.

25 The Court allowed one e-mail exhibit into evidence

1 in connection with that testimony, that it is an e-mail from  
2 Mr. Vanderheyden to counsel that were involved in that. And  
3 so that's out of the bag, so to speak.

4 And so he will testify about that and what was  
5 found and his understanding. That will be quite brief  
6 testimony because there's just not much to it. And  
7 that's -- that will be the testimony on that issue.

8 And, as I said, plaintiffs have the e-mail that  
9 they wanted to get into evidence on that. It's an e-mail  
10 written by Mr. Vanderheyden. I will ask him about it. I'm  
11 sure they will ask him about it.

12 But I think interrogatory responses in and of  
13 themselves, you show a court document to the jury, obviously  
14 counsel are involved in that. So whether it's -- I'm not  
15 sure what he means by that not being conduct of counsel.  
16 Counsel is involved in preparing interrogatory responses and  
17 court documents. I suspect the jury has some sense of that  
18 at this point. So that's why we objected to it on that  
19 basis.

20 MR. COLLYARD: Just real quickly, Your Honor. So  
21 the exhibit that Mr. Schaper just referred to is this  
22 Exhibit 325, which is the e-mail from John Vanderheyden to  
23 two lawyers at Godfrey & Kahn, and that talks --

24 THE COURT: I didn't hear you. The two lawyers?

25 MR. COLLYARD: The two lawyers from Godfrey &

1 Kahn. And he's to writing them and saying David Scherer  
2 found these six tapes. And those were the six tapes that  
3 the Court has already found were destroyed.

4 And so already I'm going to be talking about  
5 something that has to do with their lawyers, and I'm  
6 necessarily going to have to do that. And I suspect they  
7 are going to have objections on this.

8 But what this testimony all comes down to is  
9 whether or not it's -- you allowed them to put on limited  
10 proof of whether or not those documents that they destroyed  
11 were harmful, and that's all this goes to.

12 And so if they are going to get into whether there  
13 was intention to do this or how it was done, I need to be  
14 able to go into those facts and talk about how exactly it  
15 was done. And the only way I can do that right now, without  
16 putting their lawyers on the stand, is to talk about the  
17 facts that Mr. Vanderheyden knows.

18 And I'm limited to what's in his interrogatory  
19 responses, basically, because of how I'm handcuffed with not  
20 being able to talk about areas where counsel was involved,  
21 because counsel was involved in all of this.

22 MR. SCHAPER: The last thing I'll say, Your Honor,  
23 is, first of all, we don't believe that this Court has found  
24 facts. I think this Court -- this evidence is the first  
25 time it's being presented in this court.

1 More importantly, I think counsel just ignored  
2 that they argued to the Court that we should only be able to  
3 put on evidence as to whether the destruction of tapes was  
4 harmful. That application was denied.

5 I believe the Court said it would allow us to put  
6 on evidence of an innocent explanation, quoting the Eighth  
7 Circuit *Stevenson* decision, so that's what we are about to  
8 do.

9 And, as I said, they can use the interrogatories  
10 for impeachment purposes, so if -- they can ask questions.  
11 If the questions elicit testimony they feel is inconsistent  
12 with what was said in the interrogatories, then they can use  
13 them for that purpose.

14 THE COURT: I am going to reserve my ruling on  
15 this matter and digest this aspect of the arguments based on  
16 the arguments that have been made today at this late hour.  
17 And you will receive my ruling --

18 MR. COLLYARD: Thank you, Your Honor.

19 THE COURT: -- in the future.

20 THE LAW CLERK: All rise.

21 (Court adjourned at 5:08 p.m.)

22 \* \* \*

23

24

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2  
3 I certify that the foregoing is a true and correct  
4 copy of the transcript originally filed on 12/05/2022 and  
5 incorporating redactions requested by Attorney Adine S.  
6 Momoh.

7 Certified by: s/ Lori A. Simpson

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